No. _____

IN THE

Supreme Court of the United States

October Term, 1996

WALTER McMILLIAN,

Petitioner,

v.

MONROE COUNTY, ALABAMA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the same question upon which this Court granted certiorari in *Swint v. Chambers County Commission,* 115 S.Ct. 1203 (1995), but which the Court did not resolve because of the jurisdictional defect in *Swint.* The question presented is:

Whether the sheriff of a county is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. § 1983.

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No. ____

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Walter McMillian requests that a writ of certiorari issue to the United States Court of Appeals for the Eleventh Circuit to review that Court's decision holding that sheriffs in Alabama are not final county policymakers in matters of law enforcement for purposes of county liability under 42 U.S.C. § 1983.

OPINIONS BELOW

The July 9, 1996 opinion of the Eleventh Circuit is reported as *McMillian v. Johnson*, 88 F.3d 1573 (11th Cir. 1996), and is reproduced in the appendix to this petition, p. 1a. The February 18, 1994 opinion of the United States District Court for the Middle District of Alabama is unreported and is reproduced in the appendix, p. 25a. A

relevant December 13, 1993 order of the District Court is unreported and is reproduced in the appendix, p. 77a.

JURISDICTION

The opinion of the Court of Appeals was issued on July 9, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The federal statute involved is 42 U.S.C. § 1983. Article V, § 138 of the Alabama Constitution is relevant, as are various provisions of the Alabama Code, including §§ 36-22-2, 36-22-3, 36-22-5, 36-22-6, 36-22-13, 36-22-16, 36-22-17, 36-22-18, 36-22-19, 36-22-42, 11-1-11, and 11-2-30. All of these provisions are set out verbatim in the appendix, p. 81a.

STATEMENT OF THE CASE

Walter McMillian spent nearly six years on Alabama's Death Row for a crime he did not commit. Over a year of that involved pretrial detention in which he was placed on Death Row despite the fact that his case had not yet gone to trial. He eventually was tried, convicted, and sentenced to death. In February of 1993, the Alabama Court of Criminal Appeals reversed Mr. McMillian's capital murder conviction and death sentence after it was established that critical evidence corroborating Mr. McMillian's claim of innocence had been withheld by government officials. *McMillian v. State*, 616 So.2d 933 (Ala. Cr. App. 1993). A few days later, the State of Alabama dismissed the charges against Mr. McMillian and he was freed from imprisonment. The State began a new investigation to find the real perpetrator of the murder. Pet. App. 1a-2a.

This civil case was filed by Mr. McMillian against various governmental officials involved in his arrest and incarceration, including Thomas Tate, who is the Sheriff of Monroe County, Alabama. In addition, Monroe County was named as a defendant. The case seeks damages for violations of federal constitutional rights as well as various state law torts stemming from wrongful conduct in connection with Mr. McMillian's arrest and incarceration, including the pretrial detention on Death Row, the manufacture of inculpatory evidence, and the suppression of exculpatory evidence. Pet. App. 2a. The record in the case demonstrates that any judgment against Sheriff Tate is likely not to be paid from the state treasury, but by Monroe County through its insurance policy with the Association of County Commissions of Alabama. Pet. App. 77a.

Motions to Dismiss by each of the individual defendants were denied in whole or in part. However, Monroe County's motion to dismiss was granted. The County had been sued upon the plaintiff's contention that Sheriff Tate is a final county policymaker in the area of law enforcement and the County is therefore liable under § 1983 for his unconstitutional actions. The District Court rejected that contention and granted the County's motion to dismiss based upon the Eleventh Circuit's decision in *Swint v. City of Wadley*, 5 F.3d 1435, 1450-1451 (11th Cir. 1993), which held that Alabama sheriffs are not county policymakers. Pet. App. 53a-58a.

Subsequently, this Court granted certiorari in *Swint* to review the Eleventh Circuit's decision on the county policymaker issue. *Swint v. Chambers County Commission*, 114 S.Ct. 2671 (1994). This Court, however, ultimately did not resolve the merits, instead vacating the Eleventh Circuit's decision in *Swint* and holding that the Eleventh Circuit had no jurisdiction to review the county policymaker issue on an

interlocutory appeal inasmuch as no certification had been obtained under 28 U.S.C. § 1292(b) to appeal that question. *Swint v. Chambers County Commission*, 115 S.Ct. 1203, 1207-1212 (1995).

In the meantime, the District Court in the present case, having adjudicated the motions to dismiss, entertained motions for summary judgment by the defendants, granting them in part and denying them in part. Because some of the denials of summary judgment involved issues of qualified immunity, Sheriff Tate and some of the other defendants appealed pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The District Court then issued an order under 28 U.S.C. § 1292(b) certifying the county liability issue for interlocutory appeal. The Eleventh Circuit agreed to the certification. Pet. App. 3a.

The appeal of Sheriff Tate and the other individual defendants is separate from that of the petitioner. In Tate's appeal, the Eleventh Circuit affirmed the District Court for the most part, leaving Tate and several fellow defendants in the case. *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996).

As for the petitioner's separate appeal on the county liability issue, the Eleventh Circuit held that the Sheriff is not a final county policymaker in the area of law enforcement. In doing so, the Eleventh Circuit said that the line between municipal liability and non-liability "has proven elusive" and that this Court "has provided limited guidance for determining whether an official has final policymaking authority with respect to a particular action." Pet. App. 5a.

The Court of Appeals acknowledged that sheriffs are elected by the voters of the county, that the county commissions fund the sheriffs' law enforcement operations,

and that sheriffs exercise final law enforcement authority within their counties but not outside of them. Pet. App. 15a-16a_ and n. 5. Nevertheless, the Court based its ruling on a readoption of the reasoning of its earlier vacated decision in *Swint*, which had held that county liability did not exist because other county officials had no law enforcement responsibilities independent of those exercised by the sheriff. The Court of Appeals said the same in the present case:

> [In *Swint*] [w]e noted that a sheriff is a state rather than a county official under Alabama law for purposes of imposing respondeat superior liability on a county. [5 F.3d at 1450] (citing *Parker v. Amerson*, 519 So.2d 442 (Ala. 1987)). However, that fact was not dispositive. *Id.* (citing *Parker v. Williams*, 862 [F.2d 1471,] 1478 [(11th Cir. 1989)].
>
> . . . . Our examination of Alabama law revealed that Alabama counties have no law enforcement authority. *Id.* Alabama counties have only the authority granted them by the legislature. *Id.* (citing *Lockridge v. Etowah County Comm'n*, 460 So.2d 1361, 1363 (Ala. Civ. App. 1984)). Alabama law assigns law enforcement authority to sheriffs but not to counties. *Id.* (citing Ala. Code § 36-22-3(4) (1991)). Thus, we concluded that a sheriff does not exercise county power when he engages in law enforcement activities and, therefore, is not a final policymaker for the county in the area of law enforcement. *Id.* at 1451. *We continue to believe this is the correct analysis.*

Pet. App. 7a-8a (emphasis added).

This petition follows. It raises only the Eleventh Circuit's decision regarding county liability, and does not involve issues regarding the liability of other defendants.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *PEMBAUR v. CINCINNATI.*

In *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), this Court held that local governmental liability can be imposed under Section 1983 for the single action of a local governmental policymaker if that person has final policymaking authority such that his or her "acts or edicts may fairly be said to represent official policy." 475 U.S. at 480, *quoting*, *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). *Pembaur* involved a suit against several defendants, including a county in Ohio, because of an unconstitutional entry and search of the plaintiff's business. One of the alleged grounds for county liability was that the sheriff's unconstitutional actions were those of a final county policymaker. Justice Brennan's opinion in *Pembaur* made it clear that "decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to [local governmental] liability." 475 U.S. at 483, n. 12 (emphasis in original). In *Pembaur*, this Court affirmed the conclusion of the Sixth Circuit Court of Appeals that the sheriff in that case could act as a final county policymaker with respect to law enforcement. 475 U.S. at 484.

The portion of the Sixth Circuit's opinion on the matter stated that, under Ohio law, the sheriff is elected by the residents of the county, serves as chief law enforcement officer of the county, receives his office, books, furniture, and other materials from the county, and receives his salary and training expenses from the county. Because of these factors, the Sixth Circuit held that the sheriff is a final policymaker for the county with respect to the law enforcement activities at issue, *Pembaur v. Cincinnati*, 746 F.2d 337, 341 (6th Cir.

1984), and this Court affirmed on that point. 475 U.S. at 484.

Similarly, under Alabama law, the sheriff is elected by the residents of the county, serves as chief law enforcement officer for the county, receives his office, books, furniture, and other materials from the county, and receives his salary and expenses from the county. Pet. App. 15a-16a and n. 5; Ala. Const. Art. V, § 138; Ala. Code §§ 36-22-3, 36-22-5, 36-22-16, 36-22-18. There is nothing of relevance to distinguish the Alabama sheriff from the Ohio sheriff in *Pembaur*.

Certainly the technical labeling of the Alabama sheriff as a "state official" is not a relevant distinction absent some functional distinction showing that sheriffs in Alabama operate differently than those in Ohio. While the Eleventh Circuit in the present case noted that Alabama sheriffs are sometimes characterized as state officials under state law, the Court also made it clear that this point was not dispositive. Pet. App. 7a. Nor could it be. As Justice O'Connor observed in *St. Louis v. Prapotnik*, 485 U.S. 112, 126 (1988), "if . . . a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, § 1983 could not serve its useful purpose." Similarly, if states could insulate their counties from liability simply by labeling sheriffs and others who operate on the local level as "state officials," § 1983 would easily be thwarted.

Moreover, even if a state's label did somehow make a difference, Alabama's label here does not speak to the question posed by § 1983. It does not specify, for example, that the sheriff sets law enforcement policy for the state as opposed to the county, or that the sheriff is not a final county policymaker in the area of law enforcement. The Eleventh

Circuit's characterization of the sheriff as a "state official" is predicated only on the fact that the Alabama Constitution specifies that the state's executive department includes "a sheriff for each county," Ala. Const. Art. V, § 112, along with the holdings by Alabama's courts that counties are not vicariously liable for sheriffs' actions under state tort law. Pet. App. 12a.[1] Obviously, a state can structure its state law respondeat superior liabilities and immunities any way it chooses, and can attach whatever labels it wants to officials, but that does not mean the sheriff makes law enforcement policy for the state rather than the county.

Indeed, Alabama law and the Alabama courts frequently have expressed the common understanding of the sheriff as a county-based official setting policy for the county. *See, e.g., First Mercury Syndicate v. Franklin*, 623 So.2d 1075, 1075 (Ala. 1993) (county purchases professional liability insurance for the sheriff); *Jefferson County v. Dockerty*, 30 So.2d 474, 477 (Ala. 1974) ("the sheriff of Jefferson County is undoubtedly a county officer"); *In re County Officers*, 143 So. 345 (Ala. 1932) (sheriffs are "strictly speaking, county officers" for purposes of 1912 constitutional amendment regarding salaries); *State ex rel. Martin v. Pratt*, 68 So. 255, 257 (Ala. 1915) ("a sheriff [is] the highest purely executive officer of a county"). State statutes put the county commission in charge of funding the sheriff's office, Ala. Code § 36-22-18, and provide that "[i]t shall be the duty of sheriffs *in their respective counties*, . . . to ferret out crime, apprehend and arrest criminals and . . . to secure evidence of crimes *in their counties*." Ala. Code § 36-22-3(4). Beyond

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[1] In passing, the Court of Appeals seemed to suggest that the petitioner had "concede[d]" that "sheriffs in Alabama are state officers." Pet. App. 17a. Although this was not the basis of the Court's holding and is not crucial to this petition, we feel constrained to note that the petitioner never made any such concession.

that, the record in this case demonstrates that the payment of any judgment against the sheriff is not to come from the state treasury, but from an insurance fund set up by Alabama's counties. Pet. App. 77a. *See, Hess v. Port Authority,* 115 S.Ct. 394 (1994) (the fact that a judgment will not be paid from the state treasury suggests that the entity or person being sued is not the alter ego of the state for Eleventh Amendment purposes).

Thus, the occasional label of the sheriff as a state official in Alabama does not distinguish this case from *Pembaur* in any meaningful way. Instead of simply relying on the label, the Eleventh Circuit based its ruling on its conclusion that Alabama counties have no law enforcement authority independent of the sheriff. Pet. App. 7a-8a, 14a-16a. The Court of Appeals said, "Alabama counties have no law enforcement authority," and "Alabama law assigns law enforcement authority to sheriffs but not to counties." Pet. App. 7a-8a. This is circular reasoning. It simply assumes in advance that the sheriff does not function as a county official, and that the law enforcement authority of the sheriff is not being exercised for the county, but for some other entity. It hinges the inquiry on whether counties have law enforcement authority other than the authority excercised by the sheriff. This would seem to require that other county officials also be involved in law enforcement before the sheriff can be deemed a policymaker for the county. The Eleventh Circuit's analysis thus suggests that if other county officials are not involved, the sheriff must not be exercising power on behalf of the county.

Of course, the absence of law enforcement authority independent of the sheriff is not something that distinguishes Alabama counties from those in Ohio and elsewhere. It is not as if county governing boards in Ohio have independent law enforcement authority, or directly supervise the law

enforcement activities of their sheriffs, or ride around with the sheriffs in the patrol cars. Thus, this does not differentiate the present case from *Pembaur*.

Both *Pembaur* and *Prapotnik* note that the final policymaker issue is to be guided by state law (as well as custom and usage). However, state statutes -- whether in Alabama, Ohio, or elsewhere -- do not employ the terminology of § 1983 jurisprudence and do not specify whether particular officials are "final county policymakers" for the purposes of applying § 1983. Similarly, they do not state in specific terminology whether a sheriff or other official sets "county policy" or "state policy." Thus, federal courts must examine the actual structures of local government and the relationships of officials, as set out by state law, and determine, in light of the goals of § 1983, whether particular officials are "final policymakers" for local governments as that term has been articulated in *Pembaur* and *Prapotnik* and subsequent cases.

While the actual operation of local government is a matter of state law (as well as custom and usage), the question remains -- once the relevant principles of state law have been established -- whether those state law principles add up to "final policymaker" status as a matter of federal law. If the relevant principles in Ohio lead this Court to conclude, as it did in *Pembaur*, that particular officials are final county policymakers for purposes of § 1983, then the existence of those same basic principles in other states, such as Alabama, require that similar officials in those states also be considered final county policymakers. Accordingly, the challenge in this case is not so much to the Eleventh Circuit's construction of state law, but to its conclusion that this construction precludes county liability under federal law. With respect to that issue, this Court's holding in *Pembaur* is controlling, and the Eleventh Circuit's decision is in conflict.

II. THE DECISION BELOW CONFLICTS WITH THE HOLDINGS OF THE COURTS OF APPEAL FOR THE FIRST, FOURTH, FIFTH, SIXTH, AND NINTH CIRCUITS.

At least five other circuits -- the First, Fourth, Fifth, Sixth and Ninth -- have reached conclusions that are at odds with the Eleventh Circuit's decision here. Indeed, the Eleventh Circuit's opinion in this case recognizes that its reasoning conflicts with that of the Fifth Circuit in comparable cases. Pet. App. 16a and n.6. Because the case law from the Fifth Circuit is the most extensive, it will be discussed first.

In *Turner v. Upton County*, 915 F.2d 133 (5th Cir. 1990), the Fifth Circuit held that counties in Texas can be liable for the law enforcement actions of sheriffs. The plaintiff in *Turner* sued a sheriff and the county because the sheriff allegedly trumped up a sham prosecution against her. Although the federal district court granted summary judgement for the county, concluding it was not liable for the sheriff's actions, the Fifth Circuit reversed. Because of its relevance, the Fifth Circuit's discussion is quoted at length:

> It has long been recognized that, in Texas, the county sheriff is the county's final policymaker in the area of law enforcement, not by virtue of delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected:
>
> > Because of the . . . structure of county government in Texas . . . elected county officials, such as the sheriff . . . hold[] virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the

> voters for his conduct therein. . . . Thus, at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy" for which the county may be held responsible under section 1983.

Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir.1980) (quoting *Monell*, 436 U.S. at 694, 98 S.Ct. at 2037, citations omitted); *see Bennett v. City of Slidell*, 728 F.2d 762, 796 (5th Cir.1984) (en banc), *cert denied*, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985). Among other responsibilities he is charged with preserving the peace in his jurisdiction and arresting all offenders. Tex.Code Crim.P. arts. 2.13, 2.17. [He is] the county's final policymaker in this area . . . . [His duties] include the investigation of crimes, the collection of evidence thereof, and the presentation of this evidence to the district attorney for purposes of determining the appropriateness of prosecution. . . .

> The sheriff is an elected county official equal in authority to the county commissioners within that jurisdiction; his actions are as much the actions of the county as the actions of those commissioners.

Turner, 915 F.2d at 136-137. *See also, Bennett v. Pippin*, 74 F.3d 578, 586 (5th Cir. 1996) (reaffirming *Turner*).

Like the Texas sheriff in *Turner*, the Alabama sheriff is charged with preserving the peace in his or her county and arresting all offenders, investigating crimes, collecting evidence, and presenting evidence to the district attorney. Ala. Code, § 36-22-3. To use the words from *Familias*

Unidas, as quoted in *Turner*, the Alabama sheriff holds "virtually absolute sway over the particular tasks or areas entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein."

In *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), the Fifth Circuit was called upon to examine the policymaker status of an Arkansas county sheriff. In holding the sheriff to be a final policymaker for purposes of county liability, the Fifth Circuit said:

> Under Arkansas law, a county sheriff, in the execution of the statutory duty to perform law enforcement activities in and for the county, is solely responsible for the procedures and practices of the department; there is no legislative or other higher body, beyond a court of law, to which the sheriff answers.

884 F.2d at 828 (citation omitted). This is also true of a county sheriff in Alabama. Just as the sheriff was held to be a final county policymaker in *Crowder* for purposes of the investigation, search, and seizure at issue in that case, so is the Sheriff in Monroe County, Alabama, a final county policymaker for purposes of the investigation, arrest, and incarceration at issue in this case. *See also, Brooks v. George County, Mississippi*, 84 F.3d 157, 165 (5th Cir. 1996) (Mississippi sheriffs are final county policymakers).

The Eleventh Circuit in the decision below pointed out that Alabama sheriffs are in some sense labeled by Alabama law as state officers, but added that this fact was not dispositive. Pet. App. 7a. However, to the extent this accounts for the Eleventh Circuit's decision, that Court would continue to be in conflict with the Fifth Circuit. In *Crane v. Texas*, 766 F.2d 193 (5th Cir.), *cert. denied*, 474 U.S. 1020 (1985), the Fifth Circuit held a Texas county liable for

actions of a district attorney, who is technically a state official under Texas law. With respect to the district attorney, the Fifth Circuit said, "much like the county itself, his office is a local entity, created by the State of Texas and deriving its powers from those of the State, but limited in the exercise of those powers to the county, filled by its voters, and paid for with its funds." *Id.* at 195. The Court added: "[E]ven were he a State official in every sense, called so in State law and designated by the State to make policy for its other creature, the county, our answer would likely remain the same; county responsibility for violation of the Constitution cannot be evaded by such ingenious arrangements." *Id.* Similarly, the Alabama sheriff, although sometimes technically called an officer of the state under state law and deriving power from state statutes, is limited in the exercise of that power to the county, is elected by the county's voters, and is funded by the county's treasury.

With respect to the First Circuit, that Court held in *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985), that Massachusetts sheriffs can be final county policymakers regarding jail policies even though they have complete control over those policies with no involvement of other county officials. *Id.* at 571.

> What the County misunderstands is that it is not because county officials *other than the Sheriff* were "involved" in the promulgation of the strip search rule, that it is liable under *Monell*, nor is it because county officials failed properly to "oversee" the Sheriff. Rather, it is liable because the Sheriff was the county official who was elected by the County's voters to act for them and to exercise the powers created by state law. Accordingly, the Sheriff's strip search policy *was* Plymouth County's policy, and the County must respond in damages for any injuries inflicted pursuant to that policy.

Id. (emphasis in original). As with the Fifth Circuit, this First Circuit precedent conflicts with the Eleventh Circuit in the present case.

The Fourth Circuit, in *Dotson v. Chester,* 937 F.2d 920 (4th Cir. 1991), held that a Maryland sheriff is a final county policymaker for jail administration, even though under the relevant state law he was considered a state officer and not a county officer for purposes of state tort liability. *Id.* at 926. That Court quoted Justice O'Connor's caution, in her plurality opinion in *St. Louis v. Prapotnik*, against "egregious attempts by local governments to insulate themselves from liability for unconstitutional policies." 937 F.2d at 924, *quoting,* 485 U.S. at 127. Based on this, the Fourth Circuit said *Prapotnik* "indicates [§ 1983] liability rests more on final policymaking authority than on a technical characterization of an official as a state or county employee." 937 F.2d at 924. According to the Fourth Circuit, it was sufficient for county liability that the county governing board funded the jail and the sheriff managed it. *Id.* at 932. Given that the Eleventh Circuit held to the contrary in the present case, and given that it apparently gave some weight to the technical label of a sheriff as a state official, pet. app. 13a, the Eleventh Circuit is in conflict with the Fourth Circuit.

In *Marchese v. Lucas*, 758 F.2d 181, 188-189 (6th Cir. 1985), the Sixth Circuit held that Michigan counties are liable for the actions of their sheriffs even though no county officials other than the sheriff are involved in law enforcement policy, and even though Article 7, Section 6 of the Michigan Constitution provides that "[t]he county shall never be responsible for [the sheriff's] acts."

> It is clear that under the Michigan Constitution of 1968 Art. 7, Section 6, Wayne County did not make policy for the Sheriff's Department. The Sheriff is, however, the

> law enforcement arm of the County and makes policy in police matters for the County. *See* Michigan Constitution 1968 Art. 7, Section 4. The County, through its Board of Supervisors, appropriates funds and establishes the budget for the Sheriff's Department. The Sheriff is elected by the voters of Wayne County.

Id. at 188-189. As in Michigan, no one in Alabama county government makes law enforcement policy other than the sheriff, the sheriff's budget is appropriated by the county governing board, and the sheriff is elected by the voters. Article 7, Section 4 of the Michigan Constitution -- cited by the *Marchese* court -- states that "[t]here shall be elected from for four-year terms in each organized county a sheriff, a county clerk, a county treasurer . . . ." Article V, § 138 of the Alabama Constitution also provides that a sheriff is one of the public officials who shall be elected by the qualified voters in each county. The only difference is that the Alabama Constitution labels the sheriff as an official of the state executive department, while the Michigan Constitution does not, but the Eleventh Circuit has said this is not dispositive. On the point the Eleventh Circuit has said is dispositive -- the absence of any county law enforcement authority beyond that granted to the sheriff -- the Sixth Circuit clearly is in conflict.

The Ninth Circuit in *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989), rejected the same reasoning that motivated the Elevent Circuit's decision in this case. *Gobel* involved a suit against an Arizona county attorney for initiating and publicizing an arrest without probable cause. The district court there dismissed on the theory that the county attorney was simply enforcing state law independent of the county. The Ninth Circuit reversed, citing both *Blackburn v. Snow* from the First Circuit and *Crane v. Texas* from the Fifth, and held that dismissal was inappropriate in

light of the fact that county attorneys were elected by county voters, were county officers, and exercised their responsibilities within the county with a budget set by the county. 867 F.2d at 1208-1209.

These decisions from the First, Fourth, Fifth, Sixth, and Ninth Circuits make it clear that the absolute power held by an official, such as a sheriff, in a particular area of responsibility, such as law enforcement, does not absolve a county from liability for that official's actions. Alabama is no different than the states involved in those cases, or many other states for that matter, in terms of the relationship between the sheriff and the county. It is not as if the law enforcement actions of the sheriffs in those other states are subject to participation or review by county governing boards or other county officials. Indeed, the fact that the law enforcement power is held independent of other county officials demonstrates that the sheriff is a *final* county policymaker. Moreover, as *Crane* from the Fifth Circuit and *Dotson* from the Fourth Circuit illustrate, the label of the official as a "state" or "county" official is unimportant. What is important is whether the official is elected by voters of the county, exercises power only within the county, and is supported by county funds. This is the case in Alabama, as in most other places. Under the approaches of the First, Fourth, Fifth, Sixth, and Ninth Circuits, county liability would exist. The decision below by the Eleventh Circuit is in conflict.

III. THIS CASE RAISES AN IMPORTANT ISSUE OF FEDERAL LAW THAT WAS NOT RESOLVED BY THIS COURT'S DECISION IN *SWINT v. CHAMBERS COUNTY COMMISSION.*

This is an important issue of federal law. A number of cases are brought against local governments under § 1983, in

Alabama and elsewhere, for the actions of high officials, particularly in the area of law enforcement. The theory that underlies the Eleventh Circuit's decision is not limited solely to Alabama, but could be utilized in any state where certain officials, such as sheriffs, have absolute sway over particular areas, such as law enforcement, independent of other county officials. The Eleventh Circuit's narrow interpretation of local governmental liability seems contrary to what this Court described as the intent of Congress in 1871, when it enacted § 1983 in order "to provide a remedy, *to be broadly construed*, against all forms of official violation of federally protected rights." *Monell v. New York City Dept. of Social Services*, 436 U.S. at 700-701 (emphasis added).

Enough complexity exists already in the interpretation of § 1983 without the added confusion and conflict created by the Eleventh Circuit's decision. Indeed, the Eleventh Circuit itself suggested the need for clarification from this Court, stating that this is in area of the law where clarity "has proven elusive," where "[t]he Supreme Court has provided limited guidance," and where "[t]he Supreme Court has not addressed whether a municipality must have power in an area to be held liable for an official's acts in that area." Pet. App. 5a, 8a. While we believe the Eleventh Circuit has acted contrary to this Court's prior guidance, the Eleventh Circuit's own confusion demonstrates the importance of further clarification by this Court.

This Court granted certiorari in *Swint v. Chambers County Commission* to review the decision of the Eleventh Circuit and to provide direction to courts facing similar questions in the future. However, because of the jurisdictional problem in *Swint*, this Court did not resolve the merits. The present case raises the same substantive issue as *Swint*, but without the jurisdictional defect. This is an opportunity for this Court to address what it intended to

address when it granted certiorari in *Swint*.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Eleventh Circuit in this case.

Respectfully Submitted,

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APPENDIX

WALTER McMILLIAN, Plaintiff-Appellant,

v.

W. E. JOHNSON, MORRIS THIGPEN, TOM ALLEN, MARIAN SHINBAUM, CHARLIE JONES, et al., in their individual capacities, Defendants-Appellees.

No. 95-6369

United States Court of Appeals, Eleventh Circuit

July 9, 1996

Appeal from the United States District Court for the Middle District of Alabama.

Before COX, Circuit Judge, BARKETT, Circuit Judge, and PROPST, District Judge (sitting by designation).

COX, Circuit Judge:

I. FACTS AND PROCEDURAL BACKGROUND[1]

Walter McMillian was convicted of the murder of Ronda Morrison and sentenced to death. He spent nearly six years on Alabama's death row, including over a year before his trial. The Alabama Court of Criminal Appeals ultimately overturned McMillian's conviction because of the state's failure to disclose exculpatory and impeachment evidence. *McMillian v. State*, 616

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[1]For a more detailed recitation of the facts, see our opinion in No. 95-6123, also decided today.

So. 2d 933 (Ala. Crim. App. 1993). The state then dismissed the charges against McMillian and commenced a new investigation.

Finally released after six years on death row, McMillian brought a § 1983 action against various officials involved in his arrest, incarceration, and conviction. McMillian alleges federal constitutional claims, as well as pendent state law claims. McMillian sued several defendants, including Thomas Tate, the Sheriff of Monroe County, Alabama, in both his individual and official capacities, and Monroe County itself. McMillian seeks damages from Sheriff Tate individually and from Monroe County for, inter alia, causing his pretrial detention on death row, manufacturing inculpatory evidence, and suppressing exculpatory and impeachment evidence.[2]

McMillian's theory of county liability is that Sheriff Tate's "edicts and acts may fairly be said to represent [the] official policy [of] . . . Monroe County . . . in matters of criminal investigation and law enforcement." (First Amended Complaint P 53.) The district court granted Monroe County's motion to dismiss, relying on our since-vacated decision in *Swint v. City of Wadley, Ala.*, 5 F.3d 1435 (11th Cir. 1993), *vacated sub nom. Swint v. Chambers County Comm'n*, 115 S. Ct. 1203 (1995), 131 L. Ed. 2d 60, to hold that Monroe County is not liable for Sheriff Tate's actions under § 1983 because sheriffs in Alabama are not final policymakers for their counties in the area

[2]A suit against a public official in his official capacity is, in all respects other than name, treated as a suit against the local government entity he represents, assuming that the entity receives notice and an opportunity to respond. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105 (1985). We treat McMillian's claims against Monroe County as stating the same claims because McMillian contends that Sheriff Tate represents Monroe County. Whether McMillian's contention is meritorious is at issue on this appeal.

of law enforcement. In a later order, the district court granted in part and denied in part various defendants' motions for summary judgment in their individual capacities. Pursuant to 28 U.S.C. § 1292(b), we granted McMillian permission to appeal the district court's interlocutory orders.

II. ISSUES ON APPEAL

We address two issues on this appeal: (1) whether a sheriff in Alabama is a final policymaker for his or her county in the area of law enforcement; and (2) whether hearsay may be used to establish the existence of a genuine issue of material fact to defeat a motion for summary judgment when it is not shown that the hearsay will be reducible to an admissible form at trial.[3]

III. DISCUSSION

A. *Whether a Sheriff in Alabama Is A Final County Policy maker*

1. *Contentions of the Parties*

McMillian contends that our decision in *Swint* is of no

[3]McMillian raises two other issues on this appeal. First, he contends that the district court erroneously required him to prove violence or torture on his claim that the state coerced witnesses to give false testimony. We do not read the district court's opinion to impose such a requirement on McMillian.

Second, McMillian contends that the district court erred in granting partial summary judgment on certain of his claims. The district court evaluated McMillian's allegations incident by incident and determined whether a genuine issue of material fact exists as to each incident. McMillian's contention that the district court erred in evaluating evidence this way is meritless. *See* 11th Cir. R. 36-1.

precedential or persuasive value because the Supreme Court granted certiorari and then vacated our decision on jurisdictional grounds. In any event, he contends, *Swint* was wrongly decided. McMillian urges that this case is controlled by *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986), in which the Supreme Court affirmed the Sixth Circuit's holding that an Ohio sheriff could establish county law enforcement policy under appropriate circumstances. According to McMillian, the relevant facts here are the same as in *Pembaur*: in Alabama, the sheriff is elected by the county's voters, is funded by the county treasury, and is the chief law enforcement officer within the county. McMillian argues that our decision holding that Alabama sheriffs are final county policymakers in the area of jail administration, see *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989), also compels a holding that Alabama sheriffs are final policymakers in the area of law enforcement.

Monroe County contends that *Swint* correctly held that Alabama sheriffs are not county policymakers in the area of law enforcement because, under state law, Alabama counties have no law enforcement authority. In addition, according to the County, holding it liable for the actions of a sheriff would be contrary to the Supreme Court's reasoning in *Monell* in two respects. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). First, because counties have no control over sheriffs, allowing county liability for a sheriff's actions would ignore *Monell's* conception of municipalities as corporations and substitute a conception of municipalities as mere units of geography. Second, holding the county liable for a sheriff's actions would impose even broader liability than the respondeat superior liability rejected in *Monell*. Finally, Monroe County argues that cases from our circuit, as well as the better reasoned cases from other circuits, require a "functional" analysis looking to whether the county has control

over the sheriff or has other power in the area of the sheriff's actions.

2. *County Liability for Acts of Final Policymakers*

A municipality, county, or other local government entity is a "person" that may be sued under § 1983 for constitutional violations caused by policies or customs made by its lawmakers or by "those whose edicts or acts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037-38. A municipality may be held liable for a single act or decision of a municipal official with final policymaking authority in the area of the act or decision. *Jett v. Dallas Independent School District*, 491 U.S. 701, 737, 109 S. Ct. 2702, 2724, 105 L. Ed. 2d 598 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S. Ct. 915, 924, 99 L. Ed. 2d 107 (1988) (plurality opinion); *Pembaur*, 475 U.S. at 480, 106 S. Ct. at 1298. A municipality may not be held liable, however, solely because it employs a tortfeasor, that is, under a respondeat superior theory. *Monell*, 436 U.S. at 691, 98 S. Ct. at 2036. The line between actions embodying official policy--which support municipal liability--and independent actions of municipal employees and agents--which do not support municipal liability--has proven elusive.

The Supreme Court has provided limited guidance for determining whether an official has final policymaking authority with respect to a particular action. In the Court's earliest attempts to establish the contours of municipal liability, a majority of the Court was unable to agree on the appropriate approach to final policymaker status. *See Pembaur*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452; *Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107. In *Jett*, though, Justice O'Connor's approach in *Praprotnik* garnered the support of a majority of the Court. See *Jett*, 491 U.S. at 737, 109 S. Ct. at

2723-24. We draw from Justice O'Connor's opinion, as adopted in *Jett*, several principles to guide our decision.

Most important is the principle that state law determines whether a particular official has final policymaking authority. *Praprotnik*, 485 U.S. at 123, 108 S. Ct. at 924. We must look to state and local positive law, as well as custom and usage having the force of law. *Id.* at 124 n.1, 108 S. Ct. at 924 n.1. Identifying final policymakers may be a difficult task, but state law always should direct us "to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business." *Id.* at 125, 108 S. Ct. at 925. We may not assume that final policymaking authority lies in some entity other than that in which state law places it. *Id.* at 126, 108 S. Ct. at 925. To the contrary, we must respect state and local law's allocation of policymaking authority. *Id.* at 131, 108 S. Ct. at 928.

Two more principles guide our inquiry. First, "the authority to make municipal policy is necessarily the authority to make final policy." *Id.* at 127, 108 S. Ct. at 926. Second, the alleged policymaker must have final policymaking authority with respect to the action alleged to have caused the particular constitutional or statutory violation. *Id.* at 123, 108 S. Ct. at 924; *Jett*, 491 U.S. at 737, 109 S. Ct. at 2724. An official or entity may be a final policymaker with respect to some actions but not others. See *Pembaur*, 475 U.S. at 483 n.12, 106 S. Ct. at 1300 n.12. With respect to a particular action, more than one official or body may be a final policymaker; final policymaking authority may be shared. *Praprotnik*, 485 U.S. at 126, 108 S.Ct. at 925.

3. *Our Holding in Swint*

We have already addressed whether, in Alabama,

sheriffs are final policymakers for their counties in the area of law enforcement. *Swint v. City of Wadley, Ala.*, 5 F.3d 1435. In *Swint*, we held that sheriffs are not final policymakers for their counties in the area of law enforcement because counties have no law enforcement authority. *Id.* at 1451. We agree with McMillian that, because the Supreme Court held that we lacked jurisdiction in Swint and vacated our decision, *Swint* is not binding precedent. McMillian argues further that the Supreme Court questioned our holding on the merits in *Swint* and that *Swint* is of no persuasive value. Though we decline to draw any inference from the Supreme Court's grant of certiorari, we have taken a fresh look at *Swint* and the issue before us.

We recognized in *Swint* that an official with final policymaking authority in a particular area of a municipality's business may subject the municipality to § 1983 liability through her actions within that authority. *Id.* at 1450 (citations omitted). In *Swint*, the plaintiff sought to hold Chambers County, Alabama, liable for raids authorized by its sheriff. To determine whether the Chambers County Sheriff possessed final policymaking authority for Chambers County in the area of law enforcement, we looked to Alabama law, as required by *Jett* and *Praprotnik*. *Id.* We noted that a sheriff is a state rather than a county official under Alabama law for purposes of imposing respondeat superior liability on a county. *Id.* (citing *Parker v. Amerson*, 519 So. 2d 442 (Ala. 1987)). However, that fact was not dispositive. *Id.* (citing *Parker v. Williams*, 862 F.2d at 1478).

The critical question under Alabama law, we emphasized, is whether an Alabama sheriff exercises county power with final authority when taking the challenged action. *Id.* (citing *Parker v. Williams*, 862 F.2d at 1478). Our examination of Alabama law revealed that Alabama counties have no law enforcement authority. *Id.* Alabama counties have

only the authority granted them by the legislature. *Id.* (citing *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984)). Alabama law assigns law enforcement authority to sheriffs but not to counties. *Id.* (citing Ala. Code § 36-22-3(4) (1991)). Thus, we concluded that a sheriff does not exercise county power when he engages in law enforcement activities and, therefore, is not a final policymaker for the county in the area of law enforcement. 5 F.3d at 1451. We continue to believe that this is the correct analysis.

The Supreme Court has not addressed whether a municipality must have power in an area to be held liable for an official's acts in that area. Still, we think that such a requirement inheres in the Court's municipal liability analysis. As Justice O'Connor explained in *Praprotnik*, a municipal policymaker is the official with final responsibility "in any given area of a local government's business." 485 U.S. at 125, 108 S. Ct. at 925. A threshold question, therefore, is whether the official is going about the local government's business. If the official's actions do not fall within an area of the local government's business, then the official's actions are not acts of the local government. That Swint properly asked this threshold question is confirmed by our precedent, as well as cases from other circuits. *See Owens v. Fulton County*, 877 F.2d 947, 950 (11th Cir. 1989) (asking whether district attorney was exercising county or state authority); *Parker v. Williams*, 862 F.2d at 1478 (asking whether sheriff was implementing county's or state's duty); *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) (asking whether county judge was exercising county or state authority). *Accord, e.g., Eggar v. City of Livingston*, 40 F.3d 312, 314 (9th Cir. 1994) (asking whether judge's acts were performed under municipality's or state's authority), *cert. denied*, 115 S. Ct. 2566 (1995), 132 L. Ed. 2d 818 ; *Dotson v. Chester*, 937 F.2d 920, 924 (4th Cir. 1991) (asking whether sheriff wields county or state authority) (citing

Owens and *Parker*); *Baez v. Hennessy*, 853 F.2d 73, 77 (2nd Cir. 1988) (asking whether district attorney represents county or state), *cert. denied*, 488 U.S. 1014, 109 S. Ct. 805, 102 L. Ed. 2d 796 (1989); *Soderbeck v. Burnett County, Wisconsin*, 821 F.2d 446, 451-52 (7th Cir. 1987) (*Soderbeck II*) (asking whether sheriff acts on behalf of county or state).

McMillian contends that, even if *Swint*'s analytical framework is sound, *Swint* nevertheless was wrongly decided. He questions *Swint*'s conclusion that Alabama sheriffs do not exercise policymaking authority for the county in the area of law enforcement. He argues that, since their decisions are unreviewable, sheriffs must set policy for some entity. If *Swint* is correct that they do not set county policy, he reasons, then the only alternative is that they set state law enforcement policy. According to McMillian, though, sheriffs simply cannot set state law enforcement policy. Thus, they must set county policy.

We are unpersuaded by this argument. We need not, and do not, decide whether sheriffs are state policymakers to hold that they are not county policymakers. But, to respond to McMillian's argument, we note that state law could make sheriffs final policymakers for the state, notwithstanding that they are elected by county voters and have county-wide jurisdiction. McMillian's arguments to the contrary involve the power to "set policy" in a generic sense. "Policymaker" in § 1983 jurisprudence, however, is a term of art that refers to the official or body that speaks with final authority with respect to a particular governmental decision or action. *Jett*, 491 U.S. at 737, 109 S. Ct. at 2724.

Using "policy" generically, McMillian may be correct that, under principles of representative government, an official elected locally should not set statewide "policy." And he may be correct that, generically speaking, "policy" of a state

connotes a single policy rather than one state "policy" per county. But when "policy" is understood as a § 1983 law term of art, we see no reason why a county sheriff may not be a final policymaker for the state in the area of law enforcement insofar as state law assigns sheriffs unreviewable state law enforcement power.

McMillian insists that state policy cannot be different in each county. That different entities may share final policymaking authority, *Praprotnik*, 485 U.S. at 126, 108 S. Ct. at 925, however, presumes that one policymaker's actions may subject a municipality to liability even if another policymaker has a different policy. Thus, we see no anomaly in having different state policymakers in different counties. Such a situation would be no different than if each of a city's police precinct commanders had unreviewable authority over how arrestees were processed. Each commander might have a different processing policy, but that does not render a commander's policy that of her precinct as opposed to that of the city when the city is sued under § 1983 for her unconstitutional treatment of arrestees.

McMillian also argues that *Swint* conflicts with precedent from the Supreme Court and our circuit. We address those arguments below.

4. *The Supreme Court's Decision in Pembaur*

McMillian argues that the Supreme Court's decision in *Pembaur* controls his case. Based on Ohio law, the Sixth Circuit held in *Pembaur* that, in a proper case, a sheriff's acts may represent the official policy of an Ohio county. *Pembaur v. City of Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984). Though reversing on other grounds, the Supreme Court did not question the Sixth Circuit's conclusion that a sheriff could be a

county policymaker, 475 U.S. at 484, 106 S. Ct. at 1301, explaining that the Supreme Court "generally accords great deference to the interpretation and application of state law by the courts of appeals." *Id.* at n.13, 106 S. Ct. at 1301 n.13 (citations omitted). McMillian contends that the Supreme Court explicitly affirmed the Sixth Circuit's reasoning and holding and, therefore, that the Sixth Circuit's analysis controls here. We disagree.

We do not read the Supreme Court's decision as an affirmation of the Sixth Circuit's analysis of policymaker status. The Supreme Court simply deferred to the Sixth Circuit's conclusion that a sheriff is a county policymaker because the question is one of state law. The Court did not describe or discuss the state law factors on which the Sixth Circuit based its conclusion, nor did it address any arguments about whether a sheriff is a county policymaker. Instead, the Supreme Court's analysis and holding addressed whether --assuming policymaker status--a decision by a municipal policymaker on a single occasion may subject a municipality to § 1983 liability. *Id.* at 471, 106 S. Ct. at 1294. Thus, *Pembaur* does not control the issue presented here.

Even if we were to read the Supreme Court's *Pembaur* opinion as implicitly approving the Sixth Circuit's policymaker analysis, it would not follow that an Alabama sheriff is, like an Ohio sheriff, a policymaker for her county. State law determines whether a particular official has final policymaking authority. *Praprotnik*, 485 U.S. at 123, 108 S. Ct. at 924. Ohio law determined the Sixth Circuit's conclusion. But Alabama law controls our conclusion.

McMillian contends that the Ohio law factors relevant to the Sixth Circuit's decision are the same in Alabama. In both Ohio and Alabama, he argues, sheriffs are elected by the

residents of their counties; receive their salaries, expenses, offices, and supplies from their counties; and serve as the chief law enforcement officers in their counties. According to McMillian, other aspects of Alabama law are either not dispositive or irrelevant. That Alabama law deems sheriffs state rather than county officials, he argues, constitutes merely a non-dispositive label. And, he contends, whether Ohio counties have any law enforcement authority under state law was irrelevant to the Sixth Circuit's analysis, except to the extent that Ohio counties financially support the sheriff's law enforcement apparatus.

We are unpersuaded by McMillian's argument that Ohio and Alabama law are the same in all relevant respects. While we agree that similarities exist, there are differences. Under Alabama law, but not under Ohio law, a sheriff is a state officer according to the state constitution. *Parker v. Amerson*, 519 So. 2d at 442. The Constitution of Alabama of 1901 provides that the state executive department "shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county." Ala. Const. art. V, § 112 (emphasis added). The Alabama Supreme Court has held that sheriffs are employees of the state, not their counties, and thus that counties may not be held vicariously liable for sheriffs' actions. *Hereford v. Jefferson County*, 586 So. 2d 209, 210 (Ala. 1991); *Parker v. Amerson*, 519 So.2d at 442. *See also Cofield v. Randolph County Commission*, 844 F. Supp. 1499, 1502 (M.D. Ala. 1994) (dismissing county from § 1983 suit because, under Alabama law, a county may not be held vicariously liable for sheriff's actions). Moreover, as state executive officers, Alabama sheriffs generally are protected by the state's sovereign immunity under Article I, § 14, of the Alabama Constitution. *Hereford*, 586 So. 2d at 210; *Parker v. Amerson*, 519 So. 2d at

442. Thus, sheriffs enjoy a special status as state officers under Alabama law.

We recognize that a sheriff's designation as a state official is not dispositive, *Parker v. Williams*, 862 F.2d at 1478, but such a designation is relevant to whether a sheriff exercises state or county power. *See Soderbeck II*, 821 F.2d at 451-52; *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 292 (7th Cir.) (*Soderbeck I*) (finding provision of Wisconsin constitution prohibiting county respondeat superior liability for sheriff's acts "powerful evidence" that sheriff is not county policymaker), *cert. denied*, 471 U.S. 1117, 105 S. Ct. 2360, 86 L. Ed. 2d 261 (1985). McMillian would have us disregard Alabama's decision to make a sheriff a state official, characterizing it as nothing more than a label.[4] Instead, we heed the Supreme Court's admonition that federal courts respect the way a state chooses to structure its government. See *Praprotnik*, 485 U.S. at 126, 108 S. Ct. at 925.

We also reject McMillian's argument that *Pembaur* shows that whether a county has law enforcement power is irrelevant. Though the Sixth Circuit did not cite an Ohio county's law enforcement authority as a factor in its decision, we are not convinced that the existence of county law enforcement authority was irrelevant to its decision. The Ohio law cited by the Sixth Circuit strongly suggests that Ohio counties have law enforcement responsibilities beyond simply providing sheriffs with funds. Ohio law provides that "in the execution of the duties required of him, the sheriff may call to

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[4]We recognize that a state cannot insulate local governments from § 1983 liability simply by labelling local officials state officials. *Parker v. Williams*, 862 F.2d at 1479. We base our decision not on a sheriff's "label" but on a county's lack of law enforcement power, of which a sheriff's designation as a state official is evidence.

his aid such persons or power of the county as is necessary." Ohio Rev. Code Ann. § 311.07 (Baldwin 1982). It could be that the Sixth Circuit did not mention this factor because "it is obvious that the Sheriff is a County official," *Pembaur*, 746 F.2d at 341, or simply because the county did not argue that it had no law enforcement power. In any event, regardless of its relevance to the Sixth Circuit, we believe that the existence of county law enforcement power is a prerequisite to a finding that a sheriff makes law enforcement policy for a county.

5. *Our Holding in Parker v. Williams*

Relying on our decision in *Parker v. Williams*, McMillian contends that Alabama counties have the same degree of power in the area of law enforcement that we have found sufficient for county liability in the area of hiring and training jail personnel. In *Parker*, we held that a sheriff exercised county power with final authority when hiring and training a jailer who raped an inmate. 862 F.2d at 1478. We determined that counties, not the State of Alabama, have the responsibility for running jails under Alabama law, because "in practice, Alabama counties and their sheriffs maintain their county jails in partnership." *Id.* at 1478-79.

Inherent in *Parker*'s finding that counties and sheriffs maintain jails "in partnership" was a finding that counties have some duty or authority in the area of running county jails. Put another way, only because Alabama law gives both counties and sheriffs certain power with respect to running county jails could it be said that a county's power in that area takes the form of a partnership with the sheriff. McMillian correctly notes that *Parker* does not require that a municipality act "in partnership" with a government official to be liable for the official's actions. But McMillian errs to the extent that he suggests that *Parker* disavows any requirement that a municipality possess power in

a particular area for an official's actions in that area to be attributed to the municipality. *Parker* holds that a county need not directly control the sheriff to be held liable for the sheriff's actions. 862 F.2d at 1480. It does not even suggest, however, that a county need not have power in an area for a sheriff to be said to exercise county power in that area.

McMillian contends that Monroe County possesses the degree of law enforcement power required by *Parker*. *Parker* listed several features of Alabama law demonstrating that, in practice, counties share authority for running jails with sheriffs. *Parker*, 862 F.2d at 1479. *Cf. Strickler v. Waters*, 989 F.2d 1375, 1390 (4th Cir.) (state law requiring city to fund jail and keep it in good order not enough to render city liable for sheriff's actions in administering jail), *cert. denied*, 126 L. Ed. 2d 341, 114 S. Ct. 393 (1993). McMillian seizes on certain of these features to argue that counties have the requisite power in the area of law enforcement as well. McMillian is correct that certain features of Alabama law with respect to jail maintenance, primarily those relating to county funding of the sheriff's operations, also obtain with respect to law enforcement. But McMillian's analogy fails because important aspects of Alabama law evincing county power in the jail maintenance area find no parallel in the law enforcement area.

As *Parker* notes, for example, in the area of jail maintenance, the county commission is described by state law as the "body having control over the jail," to which the state board of corrections must submit certain jail inspection reports. 862 F.2d at 1479 (citing Ala. Code § 14-6-81). Though not cited in *Parker*, other provisions of the Alabama Code further demonstrate county authority over jails. For instance, the chairman of the county commission has the power to inspect jails weekly and report the results to the grand jury. Ala. Code § 11-12-22. In contrast, Alabama law allocates to counties no

similar powers in the area of law enforcement. County involvement is limited: county voters elect the sheriff and the county funds her operations.[5] Thus, it cannot be said that sheriffs and counties hold power in partnership as in *Parker*, or that counties otherwise possess the degree of law enforcement authority necessary to say that a sheriff exercises county power in that area. But see *Turner v. Upton County*, 915 F.2d 133, 136 (5th Cir. 1990) (holding that sheriff is county policymaker in area of law enforcement by virtue of election by county voters), *cert. denied*, 498 U.S. 1069, 111 S. Ct. 788, 112 L. Ed. 2d 850 (1991).[6]

Our conclusion that, under Alabama law, law enforcement is an exercise of state power, whereas jail maintenance is an exercise of county power, accords with our other precedent. McMillian argues that *Lucas v. O'Loughlin*, 831 F.2d 232 (11th Cir. 1987), cert. denied, 485 U.S. 1035, 108 S. Ct. 1595, 99 L. Ed. 2d 909 (1988), and the two Fifth Circuit cases upon which it relied demonstrate that a sheriff is a county policymaker in the area of law enforcement. He

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[5]McMillian seems to suggest that the provision requiring sheriffs to perform certain actions in their respective counties, Ala. Code § 36-22-3(4), amounts to a grant of law enforcement power to counties. It is true that state law limits a sheriff's jurisdiction to her county. But such a geographical limitation on the sheriff's power is fundamentally different from a grant of law enforcement power to the county itself.

[6]We note that the Fifth Circuit seems to view an officer's election by county voters as a significant, if not dispositive, factor in holding counties liable for the officer's actions under § 1983. *E.g.*, *id.*; *Crane v. State of Texas*, 766 F.2d 193, 195 (5th Cir.), *cert. denied*, 474 U.S. 1020, 106 S. Ct. 570 (1985). *But see Keathley v. Vitale*, 866 F. Supp. 272 276 (E.D. Va. 1994) (holding that election is not sufficient basis to attribute sheriff's acts to city). As we have explained, we do not view a sheriff's election by county voters as dispositive, particularly when other factors demonstrate that a sheriff is not exercising county power.

contends that the factors we relied on to hold that a Florida sheriff's termination of a deputy was an act of the county, *id.* at 235, are the same under Alabama law: the sheriff is elected by the county, carries out his duties within the county, is funded by the county, and has absolute authority over the subject matter. He concedes two differences between *Lucas* and his case. *Lucas* involved appointment and control of deputies, while he challenges law enforcement activities; and sheriffs in Alabama are state officers, while sheriffs in Florida are county officers. Nevertheless, McMillian argues that these differences are not dispositive. Once again, we disagree. We have already explained that an Alabama sheriff's designation as a state official is relevant to whether she exercises county law enforcement power; we shall not belabor that point.

We also disagree with McMillian's argument that the type of action challenged makes no difference. He contends that because Sheriff Tate has absolute authority over law enforcement, just as the sheriff in *Lucas* had absolute authority over the termination of his deputy, Sheriff Tate must be a final policymaker for the county in the area of law enforcement. This argument fails for at least two reasons. First, that an official has absolute authority over an area shows only that she is a final policymaker in the area; it says nothing about whose authority she exercises in that area, i.e., whether she is a final policymaker for the county or the state. *Keathley v. Vitale*, 866 F. Supp. at 275. Second, whether the action challenged involves termination of an employee or traditional law enforcement activity is critical to whether a sheriff exercises county or state authority. *Lucas* bears this out.

In holding that the Florida sheriff acted as a county policymaker, *Lucas* relied on the distinction between an official's local power in administrative matters and her state power in other matters. We quoted two Fifth Circuit cases

drawing the distinction between local duties and state duties. *Lucas*, 831 F.2d at 235. *Familias Unidas* distinguished between a Texas county judge's traditional role in the administration of county government and his role in implementing a state statute. *Familias Unidas*, 619 F.2d at 404. In that case, the Fifth Circuit held that the judge's role in implementing a state statute, "much like that of a county sheriff in enforcing a state law," effectuated state policy. *Id.* *Van Ooteghem* similarly distinguished between a county treasurer's "effectuation of the policy of the State of Texas [and] . . . discretionary local duties in the administration of county government," holding that the treasurer's "decisions regarding termination of [an employee] fall on the local not the state side of his duty: he was about the business of county government . . ." *Van Ooteghem v. Gray*, 774 F.2d 1332, 1337 (5th Cir. 1985). In *Lucas*, we determined that the same principle applied to the Florida sheriff's termination of a deputy; thus, the sheriff was about the business of county government, rendering the county liable for his actions under § 1983. *Lucas*, 831 F.2d at 235.

Our holding here that Sheriff Tate is not a final policymaker for Monroe County in the area of law enforcement, because Monroe County has no law enforcement authority, really is just another way of saying that when Sheriff Tate engages in law enforcement he is not about the business of county government. The sheriff in *Lucas*, in contrast, was about the business of county government in terminating a deputy. And the sheriff in Parker was about the business of county government when negligently hiring the jailer. The county and sheriff maintain county jails in partnership, and hiring a jailer falls on the local, administrative side of the sheriff's duties.

We drew this distinction between local, administrative

duties and state duties in our post-Parker decision in *Owens v. Fulton County*, 877 F.2d 947. In *Owens*, we held that a Georgia district attorney acts for, and exercises the power of, the state rather than the county when making prosecutorial decisions. 877 F.2d at 951, 952. Citing *Parker*, we noted that an official simultaneously may exercise county authority over some matters and state authority over others. *Id.* at 952 (citing *Parker*, 862 F.2d at 1479). We found that a Georgia district attorney's relationship to the county involves merely budgetary and administrative matters. *Id.* See also *Parker*, 862 F.2d at 1478 ("The relationship between [the sheriff] and the county . . . is central to the evaluation of whether the county can be liable for [his] actions.") Thus, we determined, a district attorney's acts with respect to budgetary and administrative matters--such as terminating an employee--may be exercises of county authority. But we held that the prosecution of state offenses is an exercise of state authority. *Owens*, 877 F.2d at 952.

B. *Whether Hearsay May Be Used To Defeat Summary Judgment*

In Count Three of his complaint, McMillian alleges that three officials--Sheriff Tate, Larry Ikner, an investigator in the prosecutor's office, and Simon Benson, an Alabama Bureau of Investigation agent--coerced prosecution witnesses into giving false testimony at McMillian's trial and thus knowingly used perjured testimony. The district court granted partial summary judgment to Tate, Ikner, and Benson on McMillian's claim that they coerced Bill Hooks and Joe Hightower into testifying falsely, holding that McMillian had failed to present sufficient evidence to raise a genuine issue of material fact as to whether Tate, Ikner, and Benson coerced Hooks and Hightower or knowingly used their perjured testimony. The district court held that McMillian could not create a genuine issue for trial with

Hooks and Hightower's hearsay statements to Alabama Bureau of Investigation agents because the statements would be inadmissible at trial. In the hearsay statements, Hooks and Hightower say that they were pressured to perjure themselves; now they say in sworn affidavits that they were not coerced and testified truthfully at trial.

McMillian contends that the district court erred in refusing to consider the hearsay evidence on summary judgment. He contends that the Supreme Court's decision in *Celotex* and our decisions in *Church of Scientology* and *Offshore Aviation* permit the use of hearsay to defeat a motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Church of Scientology v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 54 (1994), 130 L. Ed. 2d 13; *Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013 (11th Cir. 1987). Tate, Ikner, and Benson contend that the district court properly refused to consider the hearsay. Tate contends that McMillian misreads *Celotex*.

We do not read *Celotex* to permit McMillian to defeat summary judgment with the type of hearsay evidence offered in this case. In *Celotex*, the Supreme Court said:

> We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally

> expect the nonmoving party to make the showing to which we have referred.

477 U.S. at 324, 106 S. Ct. at 2553. We read this statement as simply allowing otherwise admissible evidence to be submitted in inadmissible form at the summary judgment stage, though at trial it must be submitted in admissible form. *See Offshore Aviation*, 831 F.2d at 1017 (Edmondson, J., concurring).

McMillian does not contend that Hooks and Hightower's statements are admissible for their truth, that is, as substantive evidence that they were coerced into testifying falsely. Nor does McMillian contend that the content of the statements will be reduced to admissible form at trial. He contends that Hooks and Hightower might change their sworn affidavit testimony and admit to being coerced, but a suggestion that admissible evidence might be found in the future is not enough to defeat a motion for summary judgment. McMillian alternatively contends that he can use the statements to impeach Hooks and Hightower if they testify, consistently with their affidavits, that they were not coerced and did not testify falsely at McMillian's criminal trial. While the statements may be admissible for that purpose, the district court correctly noted that such impeachment evidence is not substantive evidence of the truth of the statements alleging coercion. Such potential impeachment evidence, therefore, may not be used to create a genuine issue of material fact for trial. Because Hooks and Hightower's statements will be admissible at trial only as impeachment evidence, the statements do not create a genuine

issue of fact for trial.[7]

Neither *Church of Scientology* nor *Offshore Aviation* holds that inadmissible hearsay may be used to defeat summary judgment when the hearsay will not be available in admissible form at trial. In *Church of Scientology*, we held that the district court should have considered newspaper articles offered as evidence that Clearwater's city commission conducted its legislative process with the intention of singling out the Church of Scientology for burdensome regulation. 2 F.3d at 1530-31. There was no argument that the events recounted in articles could not be proven with admissible evidence at trial, and we expressed no opinion as to whether the articles themselves would be admissible at trial. *Id.* at 1530-31 & n.11. Indeed, there was every indication that witnesses would be able to testify at trial from their personal knowledge of the events recounted in the articles. Here, in contrast, McMillian points to no witness with personal knowledge who will testify at trial that Hooks and Hightower were coerced into testifying falsely.

In *Offshore Aviation*, we held that the district court should have considered a letter offered in opposition to a motion for summary judgment. 831 F.2d at 1015. The party moving for summary judgment argued for the first time on appeal that the letter was inadmissible hearsay. *Id.* We held that the objection to the letter's admissibility was untimely and that the district court should have considered the letter in its summary judgment decision. *Id.* at 1016. We also noted that the fact that the letter itself would be inadmissible at trial did "not undercut the existence of any material facts the letter may

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[7]McMillian also argues that there is other evidence that creates a genuine issue of fact for trial as to whether Tate, Ikner, and Benson coerced Hooks and Highwater into testifying falsely. We agree with the district court that the evidence is insufficient to raise a genuine issue for trial.

[have] put into question." *Id.* at 1015. Though we agree with McMillian that this and certain other language in our opinion suggests that inadmissible hearsay may be used to defeat summary judgment, we do not read *Offshore Aviation* to hold that inadmissible hearsay may be used even when it cannot be reduced to admissible evidence at trial. There was no indication in *Offshore Aviation* that the letter could not be reduced to admissible evidence at trial. Indeed, that the letter at issue was based on the writer's personal knowledge, *id.* at 1016, indicates that there was no impediment to the writer testifying at trial as to the facts described in the letter.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment. AFFIRMED.

PROPST, District Judge, concurring specially:

I concur in Judge Cox's well-reasoned opinion. I write separately only to address the opinion in *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989).

I recognize that *Parker v. Williams* apparently holds that Alabama counties and sheriffs are partners in the operation of jails. I do not agree that Alabama law provides a reasonable basis for such a holding. I respectfully suggest that sheriffs and counties have independent obligations with reference to jails. The counties' sole responsibilities, under Alabama law, relate to the jail facilities.

I find no *Alabama* law which gives counties any authority to run or operate jails. Under Alabama law, the sole authority for "*running*" or *operating* jails and hiring jailors is

placed with sheriffs. In my opinion, the mere fact that counties provide jail facilities and funds for salaries, etc. does not make them "partners" of the sheriff in the operation of jails.[1] Counties have no more "control" over the "running" or operation of jails than they have over law enforcement by the sheriffs. Sheriffs also "hire and train" law enforcement officers with county funds. My full reasoning is addressed in *Turquitt v. Jefferson County*, __ F. Supp. __, (N.D. Ala. Jan. 19, 1996).

[1]"Partneships" generally involve agreements to share profits and losses. I assume that the term "partner" in *Parker* was used in some analogous sense. To the extent that payment of expenses and hiring and training of officers with county funds arguably makes the county a "partner," it would appear to be equally applicable to law enforcement activities.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WALTER MCMILLIAN,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CASE NO.
	)	CV-93-A-699-N
W.E. JOHNSON; ET AL,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION
(Filed February 18, 1994)

This cause is now before the Court on the Motions to Dismiss filed by Defendants Tom Tate, Larry Ikner, Simon Benson, Mike Barnett, and Monroe County, Alabama. For the reasons set forth below, the Court finds that the Motions to Dismiss filed by Defendants Tate, Ikner, Benson, and Barnett are due to be granted in part and denied in part. The Motion to Dismiss filed by Defendant Monroe County is due to be granted.

STATEMENT OF FACTS

Because this cause is before the Court on motions to dismiss, the Court accepts the allegations of Plaintiff's First Amended Complaint ("Complaint") as true. The Complaint alleges the following facts:

On November 1, 1986, in the middle of the morning, a woman named Ronda Morrison was murdered in Monroeville, Alabama, inside a business establishment known as Jackson Cleaners. In June of 1987, Plaintiff Walter McMillian was arrested and charged with Ronda Morrison's murder.

Following his arrest, Plaintiff was held in the Monroe County jail. On July 29, 1987, Plaintiff was transferred to the custody of the Alabama Department of Corrections. As a result of the actions of Defendant Tom Tate, Sheriff of Monroe County, Defendant Larry Ikner, an investigator for the Monroe County District Attorney, Defendant Simon Benson, an investigator for the Alabama Bureau of Investigation, and other government officials, Plaintiff was incarcerated on death row in Holman Prison. These Defendants put Plaintiff on death row as a pretrial detainee for the purpose of punishing and intimidating him. Plaintiff remained on death row until his trial approximately one year later.

In August of 1988, Plaintiff was tried for the murder of Ronda Morrison and convicted. In September of 1988, he was sentenced to death.

Defendants Tate, Ikner, and Benson were primarily responsible for the investigation of Ronda Morrison's murder. Plaintiff would not have been prosecuted or convicted but for the fact that these Defendants suppressed a great deal of exculpatory evidence.

Defendants Tate, Ikner, and Benson suppressed evidence related to the testimony of Ralph Myers who was the key witness against Plaintiff. Myers testified, falsely, that

he drove Plaintiff and himself in Plaintiff's truck to Jackson Cleaners on the morning of the murder, and that Plaintiff went inside the Cleaners while Myers waited in the parking lot. Myers testified that he heard gunshots, went inside the Cleaners, and saw Ronda Morrison dead and Plaintiff with a gun.

Defendants Tate, Ikner and Benson suppressed evidence indicating that Myers lied in his testimony. For example, on June 3, 1987, Myers was asked by Defendants Tate, Ikner, and Benson in a tape-recorded interview if Plaintiff had committed or ordered the murder of Ronda Morrison. Myers said that Plaintiff had nothing to do with the murder and offered to take a polygraph examination regarding this matter. From late May, 1987, until at least June 9, 1987, Myers repeatedly told Defendants during interrogations that Plaintiff was not involved in the murder.

Prior to Plaintiff' s trial, Myers was sent to the Taylor-Hardin medical facility for a psychiatric examination. While there, Myers told four hospital staff doctors that he was being pressured and threatened by law enforcement officials to frame an innocent man. Myers was referring to Plaintiff.

On August 27, 1987, a man named Isaac Dailey told Defendant Benson in a tape-recorded statement that Myers had said he was going to frame Plaintiff for still another murder.

All of this exculpatory evidence was known to Defendants Tate, Ikner, and Benson. However, Plaintiff could not use the evidence to defend himself in his criminal trial because these Defendants withheld and suppressed the evidence.

Furthermore, Defendants Tate, Ikner, and Benson pressured and threatened Myers in order to persuade him to give evidence implicating Plaintiff in the murder, evidence these Defendants knew, or should have known, was false. Among other things, these Defendants threatened Myers by telling him he would receive the electric chair if he did not implicate Plaintiff, but Myers would live if he did implicate Plaintiff. Also, these Defendants intimidated Myers by having him incarcerated on death row in 1987, even though Myers had not been convicted of capital murder or sentenced to death. All of this pressure and intimidation eventually caused Myers to implicate Plaintiff and to testify against Plaintiff.

The only other witnesses at the trial who gave testimony indicating that Plaintiff committed the murder were Bill Hooks, Jr. and Joe Hightower. Hooks falsely testified that he drove by Jackson Cleaners the morning of the murder and saw Myers and Plaintiff get into the Plaintiff's truck and drive away. Hightower falsely testified that he saw Plaintiff's truck outside Jackson Cleaners on the morning of the murder.

Defendants Tate, Ikner, and Benson withheld and suppressed evidence relating to both Hooks and Hightower that was exculpatory for Plaintiff. For example, as a result of his willingness to testify falsely against Plaintiff, pending criminal charges against Hooks were dropped, other pending charges against him were never prosecuted, he was relieved from paying several fines he owed as a result of prior convictions, he received money from Defendant Tate, and he was promised an additional reward of $5,000.00 which he received after the trial. In addition to Defendant Tate, Defendants Ikner and Benson knew of these arrangements and helped bring them about.

As a result of his willingness to testify falsely against Plaintiff, Hightower was promised a reward of $2,000.00 or more, which he received after the trial. Defendants Tate, Ikner, and Benson knew of this arrangement and were involved in bringing it about.

Both Hooks and Hightower, when testifying at trial about the truck they saw outside Jackson Cleaners, said the truck was a "lowrider" and low "to the ground." However, Defendants Tate, Ikner, and Benson learned well in advance of the trial that Plaintiff's truck had not been converted into a "low-rider" until several months after the murder.

Defendants Tate, Ikner, and Benson procured Hooks' false testimony in part by having Hooks look at Plaintiff's truck at the Monroe County Jail after Plaintiff had been arrested so Hooks could later describe this truck as the one he saw outside Jackson Cleaners.

Defendants Tate, Ikner, and Benson pressured, threatened, and intimidated Hooks and Hightower, as well as various other people, in an effort to persuade these people to give false evidence implicating Plaintiff in the murder. These Defendants also threatened potential witnesses in an effort to prevent them from coming forward with truthful testimony that would tend to exonerate Plaintiff.

In addition to the foregoing, Defendants Tate, Ikner, Benson, and Barnett, an officer with the Alabama Department of Public Safety, withheld and suppressed evidence exculpatory to Plaintiff that was obtained from a man named Miles Jackson. Jackson gave law enforcement officers a statement that was summarized in an Alabama Department of Public Safety report prepared by Defendant Barnett. In his

statement, Jackson gave information regarding the timing of the murder that undermined the prosecution's theory of how the murder occurred. This evidence was not disclosed to Plaintiff.

Additional exculpatory evidence was suppressed. Defendant Barnett saw the Plaintiff at his home around the time the murder was committed. Thus, Defendant Barnett could have testified to support Plaintiff's alibi defense. However, Defendant Barnett suppressed this evidence. Defendants Tate, Ikner, and Benson also knew of this evidence, yet suppressed it.

More evidence was suppressed. Defendants Tate, Ikner, and Benson suppressed statements from various individuals who gave descriptions of potential suspects near the scene of the crime that did not match the description of Plaintiff. Some individuals also gave descriptions of vehicles near the crime scene that did not match the description of Plaintiff' s truck and contradicted the inculpatory testimony of Hooks and Hightower.

The actual arrest of Plaintiff occurred in June of 1987. Defendants Tate, Ikner, and Benson instigated and planned the arrest of Plaintiff, and Defendant Tate carried out the arrest on June 7. The June 7 arrest was based upon an accusation that Plaintiff committed the crime of sodomy against Ralph Myers in Conecuh County, Alabama. Plaintiff did not commit such crime. Defendants pressured Myers into concocting this phony charge so they could obtain custody of Plaintiff in order to construct evidence against him on the murder charge. However, these Defendants knew, or should have known, that the sodomy charge was false, and there was

no factual basis and no probable cause for believing that Plaintiff committed such a crime.

Defendants Tate, Ikner, and Benson caused an application for a Conecuh County arrest warrant for sodomy, and an affidavit in support of that application, to be submitted when they knew, or should have known, that the affidavit and application contained false information and were insufficient to establish probable cause and to support an arrest warrant. Moreover, these Defendants deliberately omitted crucial exculpatory information from the arrest warrant application and affidavit.

These Defendants timed the arrest of Plaintiff so they could pick him up while he was driving his truck, impound the truck, and take it to the Monroe County jail where Hooks looked at the truck so he could later describe it as the truck he saw outside Jackson Cleaners on the morning of the murder.

Despite Myers' allegation that Plaintiff's act of sodomy took place in Conecuh County, these Defendants arrested Plaintiff and immediately incarcerated him in the Monroe County jail, rather than sending him to Conecuh County. Plaintiff was never sent to Conecuh County to answer the sodomy charges, and the charges were later dismissed.

Defendants Tate, Ikner, and Benson also instigated and carried out the subsequent arrest and prosecution of Plaintiff for the murder of Ronda Morrison. This subsequent arrest occurred on June 8, 1987, while Plaintiff was already in the Monroe County jail as a result of the arrest the previous day. These Defendants knew, or should have known, there

was no probable cause for believing that Plaintiff committed the murder.

These Defendants caused an application and an affidavit to be submitted for a Monroe County arrest warrant for the murder when they knew, or should have known, the application and affidavit contained false information and were insufficient to establish probable cause and to support an arrest warrant. Moreover, these Defendants omitted crucial exculpatory information from the application and affidavit that would have demonstrated a lack of probable cause.

Some time after Plaintiff's arrest on charges of murder, Defendant Tate testified before a grand jury in Monroe County in an effort to obtain an indictment against Plaintiff for the Morrison murder. During that appearance, Defendant Tate gave testimony that he knew or should have known was false, and he deliberately omitted crucial facts that would have been exculpatory for Plaintiff and would have prevented the indictment from being issued. As a result of Defendant Tate's testimony, an indictment was issued against Plaintiff.

Racial discrimination was one of the motives of Defendant Tate in instigating and effectuating the arrest and prosecution of Plaintiff who is black. While Plaintiff was at the Monroe County jail following his June 7, 1987 arrest, Defendant Tate made racist remarks to him and used racial epithets. Defendant Tate, using racial epithets, told Plaintiff he would like to take Plaintiff out back and lynch him just like a black man who recently had been lynched by hanging in Mobile, Alabama.

The prosecution of Plaintiff for murder was instigated, effectuated, and maintained by Defendants Tate, Ikner, and Benson without probable cause, using evidence and testimony they knew, or should have known was false, and suppressing and withholding important exculpatory evidence.

Even after Plaintiff had been convicted and sentenced to death, Defendants Tate, Ikner, and Benson continued to threaten and intimidate potential witnesses in an effort to prevent them from giving exculpatory evidence during post-trial proceedings. In November of 1988, a man named Darnell Houston gave testimony in a hearing on a motion for new trial that contradicted the testimony of Hooks at Plaintiff's trial. According to Houston, Hooks could not have seen Plaintiff's truck outside Jackson Cleaners on the morning of the murder because Hooks was at work all day. In an effort to punish Houston for his testimony, and to discourage other exculpatory witnesses from coming forward, Defendant Tate engineered a prosecution and indictment of Houston for perjury. These perjury charges were later dismissed.

In the years after the trial, a great deal of exculpatory evidence came to light. Myers recanted his testimony implicating Plaintiff. Hooks and Hightower also recanted their inculpatory testimony. Later, Plaintiff discovered the exculpatory evidence that had been suppressed.

In February of 1993, the Alabama Court of Criminal Appeals reversed Plaintiff's conviction because of failure to disclose exculpatory evidence. In March of 1993, the State of Alabama dismissed the charges against Plaintiff, and he was set free after nearly six years on death row for a crime he did not commit. A new investigation was commenced to determine the identity of the person who committed the

murder for which Plaintiff was wrongly arrested and convicted.

On June 4, 1993, Plaintiff filed this action against numerous defendants including Defendants Tate, Ikner, Benson, Barnett, and Monroe County. Plaintiff alleges violations of his rights under the United States Constitution, the Alabama Constitution, and Alabama statutory and common law. Defendants Tate, Ikner, Benson, Barnett, and Monroe County have filed Motions to Dismiss. The Court now considers those motions.

STANDARD OF REVIEW

A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also Wright v. Newsome*, 795 F.2d 964, 967 (11th Cir. 1986) ("[W]e may not . . . [dismiss] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims in the complaint that would entitle him or her to relief."). A court must accept as true all well-pleaded factual allegations and view them in a light most favorable to the non-moving party. *Hishon*, 467 U.S. at 73; *H.J. Inc. v. Northwestern Bell Tel. Co.* 492 U.S. 229, 249-50 (1989). Moreover, the threshold that a complaint must meet to survive a motion to dismiss for failure to state a claim upon which relief can be granted is "exceedingly low." *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 703 (11th Cir. 1985).

DISCUSSION

Plaintiff's First Amended Complaint ("Complaint"), filed July 14, 1993, contains twenty-seven counts. The first ten counts are brought pursuant to the United States Constitution and 42 U.S.C. § 1983.[1] Counts Eleven through Twenty-Seven are brought pursuant to the Alabama Constitution and the statutory and common law of the State of Alabama.

Defendants Benson and Barnett are sued in their individual capacities only. Defendant Tate and Defendant Ikner are sued in their individual capacities, and in their official capacities as the "Sheriff of Monroe County" and as "an investigator for the Monroe County District Attorney's office," respectively. *First Amended Complaint* ¶¶ 11 and 12. The Court construes the Complaint as alleging federal and state claims against Defendants Tate and Ikner in their official capacities as officers of *Monroe County*, not as officers of the *State of Alabama*.[2] The Court views Count Ten and Count

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[1]To state a claim under § 1983, "a plaintiff must allege facts showing that the defendant's acts or omissions, done under the color of state law, deprived him of a right, privilege, or immunity protected by the Constitution or the laws of the United States." *Emory v. Peeler*, 756 F.2d 1547, 1554 (11th Cir. 1985).

[2]With respect to his federal claims, Plaintiff makes it clear that he is suing Defendants Tate and Ikner in their official capacities as officers of Monroe County, not as officers of the State:

> A suit against an officer in his or her *official* capacity is simply a recharacterization of a claim against the relevant governmental entity. If a judgment against Tate [or Ikner] in his *official* capacity would be paid from the state treasury, it appears that if would be barred by the Eleventh Amendment because it would be--in effect--a suit against the state. If it were paid out of the county treasury, it would not be barred by the Eleventh Amendment because it would be a suit against the county.

Twenty-Seven, both of which allege claims directly against Monroe County based on alleged behavior by Defendants Tate and Ikner, as encapsulating the official capacity claims against Defendants Tate and Ikner.[3] The rest of the counts are construed as alleging individual capacity claims only.

The Court will address the counts in order and only as they apply to Defendants who have moved for dismissal. When the Court refers generally to "Defendants" in the *Discussion* section of this opinion, it is referring only to the Defendants named in the count being discussed.

Count I

The Court holds that Count One sufficiently states a claim upon which relief can be granted. In Count One, Plaintiff alleges that Defendants Tate, Ikner, and Benson

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Parker v. Williams, 862 F.2d 1471, 1476 n.4 (11th Cir. 1989). The distinction is not very important at this stage of the case inasmuch as the county has been sued as a separate defendant with liability premised, in part, on the actions of Tate [and Ikner].

Plaintiff's Response in Opposition to Motion to Dismiss of Defendant Thomas Tate at p. 2 n.1. The Court interprets the Plaintiff's state claims in the same way. That is, Plaintiff intends to sue Monroe County by characterizing his state law claims against Defendants Tate and Ikner as official capacity claims. These official capacity state law claims are encapsulated by Count Twenty-Seven which is alleged as a direct suit against Monroe County.

[3]A § 1983 suit against a government official in his or her official capacity is simply a recharacterization of a suit against the governmental entity the official represents. *Parker v. Williams*, 862 F.2d 1471, 1476 n.4 (11th Cir. 1989). The Court assumes the Plaintiff to be proceeding under a similar understanding as to the state law claims.

violated Plaintiff's rights under the Fourteenth Amendment to the United States Constitution by causing the incarceration of Plaintiff on death row while he was a pretrial detainee. *First Amended Complaint* ¶ 44. Defendants raise four grounds for dismissal of Count One: statute of limitations, Eleventh Amendment immunity, qualified immunity, and lack of authority to order incarceration on death row.

Statute of Limitations: The Court holds that no Defendant sufficiently pleads the statute of limitations defense to warrant dismissal of Count One. All Parties to this action agree that § 1983 actions in Alabama are governed by a two-year statute of limitations. *Lufkin v. McCallum*, 956 F.2d 1104 (11th Cir.), *cert. denied*, 113 S. Ct. 326 (1992). The Parties disagree about when Plaintiff's actions accrued. In the Eleventh Circuit, a § 1983 action accrues when the plaintiff first realizes, or should have realized, (1) that he or she has been injured and (2) who inflicted the injury. *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987). In this case, the Complaint does not allege when Plaintiff realized that he may have been "injured," in the Constitutional sense of the word, by his incarceration on death row. Nor does the Complaint allege when Plaintiff realized who was responsible for that injury. It is up to the defense to raise and prove a statute of limitations defense. *Fed. R. Civ. P.* 8(c). All Defendants raise the statute of limitations defense generally, but none urge its application to Count one specifically. Since no Defendant specifically argues the point, neither does Plaintiff. As a result, the Court is without sufficient facts to determine that Count One is time barred on the basis of the pleadings. The statute of limitations may be raised later as an affirmative defense.

Eleventh Amendment Immunity: The Court holds that the Eleventh Amendment to the United States Constitution does not shield Defendants from suit in their individual capacities. Defendants seem to concede that the absolute immunity of the Eleventh Amendment can shield them from liability only if they are sued in their *official* capacities as state officers.[4] They argue, however, that all of Plaintiff's claims against them, including the ones Plaintiff characterizes as individual capacity claims, are appropriately construed as claims against them in their official capacities as state officers. Defendants reason that any actions they took in connection with Plaintiff's arrest and prosecution were in the course of their work as state officials.

Defendants' argument is contrary to Eleventh Circuit precedent. In *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989), the plaintiff was kidnapped and raped by a county jailer. The plaintiff sued the county sheriff for his hiring of the jailer who had a history of mental problems and drug abuse. The Eleventh Circuit held that the sheriff (a state officer) was not entitled to Eleventh Amendment immunity for claims against him in his individual capacity. *Id.* at 1476. The sheriff was not entitled to Eleventh Amendment immunity even though he hired the jailer in the course of his work as sheriff. Similarly, the Defendants in this case are not entitled to Eleventh Amendment immunity as to the individual capacity claims even if their alleged behavior was in the course of their jobs as state officials. Thus, Defendants are amenable to suit as individuals.

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[4]"[A state official] is not entitled to assert the absolute immunity of the Eleventh Amendment as a defense to actions against him in his individual capacity." *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989).

Qualified Immunity: The Court holds that Count One states a claim against Defendants sufficient to overcome Defendants' qualified immunity. Defendants argue that Count One does not allege that Defendants violated a "clearly established statutory or constitutional right."[5] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). On the contrary, the Supreme Court has "clearly established" the right of a pretrial detainee not to be punished. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."). The Supreme Court has also stated that an intent to punish on the part of the relevant governmental officials is indicative of the nature of a particular condition of confinement as "punishment" or not "punishment" in the Constitutional sense. *Id.* at 538. Plaintiff alleges that he was punished as a pretrial detainee by being incarcerated on death row. *First Amended Complaint* ¶ 19. He also alleges that his incarceration on death row was "intended for the purpose of punishing." *Id.* Thus, the Court finds that Count One is sufficient to overcome Defendants' qualified immunity for purposes of a motion to dismiss.

Lack of Authority: Finally, the Court finds that Plaintiff's allegations are sufficient to state a claim despite Defendants' contention that they lacked the authority to decide where Plaintiff would be held prior to trial. Plaintiff alleges that Defendants conspired with those who had the

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[5]"[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

authority to effect Plaintiff's placement on death row. *First Amended Complaint* ¶ 19. Such a conspiracy theory is sufficient to state a § 1983 claim. *See, e.g., Dennis v. Sparks*, 449 U.S. 24 (1980). Thus, Count One survives Defendants' Motions to Dismiss.

Count Two

The Court holds that Count Two sufficiently states a claim upon which relief can be granted. In Count Two, Plaintiff alleges that Defendants Tate, Ikner, Benson, and Barnett violated the Plaintiff's rights under the Fourteenth Amendment to the United States Constitution by withholding and suppressing exculpatory evidence. *First Amended Complaint* ¶ 45. Defendants raise three grounds for dismissal of Count Two: statute of limitations, qualified immunity, and absolute prosecutorial immunity.

Statute of Limitations: The Court holds that Plaintiff's claim under Count Two is not barred by the statute of limitations. As mentioned in the analysis of Count One, all Parties to this action agree that § 1983 actions in Alabama are governed by a two year statute of limitations. *Lufkin v. McCallum*, 956 F.2d 1104 (11th Cir. 1992). The Parties disagree about when Plaintiff*s* actions accrued. In the Eleventh Circuit, a § 1983 action accrues when the plaintiff first realizes, or should have realized, (1) that he or she has been injured and (2) who inflicted the injury. *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987). The Complaint alleges in a number of places that Plaintiff did not discover that exculpatory evidence had been withheld until well within the two-year statutory period. *See e.g., First Amended Complaint* ¶¶ 22 and 28 (alleging that exculpatory

evidence not discovered until 1992). Therefore, the statute of limitations is no bar to Plaintiff's claim under Count Two.

Qualified Immunity: The Court finds that Count Two states a claim sufficient to withstand Defendants' motions based on qualified immunity. Defendants argue that they, as investigators and law enforcement officers, have no independent duty to disclose exculpatory evidence to a criminal defendant. Plaintiff is unable to provide, and the Court does not find, any authority that "clearly establishes" such a duty.[6] Thus, to the extent that Count Two alleges that Defendants withheld evidence from Plaintiff when he was a criminal defendant, the Court holds that Count Two fails to state a claim. The Parties seem to agree, however, that investigators and law enforcement officers have a "clearly established" duty under the Fourteenth Amendment to disclose all exculpatory evidence to the prosecutor who, in turn, must disclose such evidence to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963). The allegations in Plaintiff's Complaint support a theory of liability based on the Defendants' failure to disclose exculpatory material to the prosecution. Thus, the Court holds that the Complaint sufficiently alleges a § 1983 claim based on the violation of Plaintiff's "clearly established" right to be made aware of all exculpatory evidence.

Absolute Prosecutorial Immunity: The Court holds that the doctrine of absolute prosecutorial immunity does not

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[6]For a Constitutional duty, or its corresponding right, to be "clearly established" in Alabama, the duty or right must have been recognized by the United States Supreme Court, the Eleventh Circuit, or the Supreme Court of Alabama at the time the actions at issue occurred. *Courson v. McMillian*, 939 F.2d 1479, 1498 n.32 (11th Cir. 1991).

shield Defendants from liability under Count Two. The Court does not need to address the prosecutorial immunity defense as it applies to Plaintiff's theory that Defendants had a clearly established Constitutional duty to disclose evidence to *Plaintiff* because the Court has already held no such duty had been clearly established. With respect to Plaintiff's theory that Defendants had a Constitutional duty to disclose all exculpatory evidence to the prosecution, the Court holds that prosecutorial immunity does not apply. Defendants argue that when an investigator or law enforcement officer functions as a prosecutor, he or she should have the benefit of the prosecutor's absolute immunity. *See, Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2671 (1993) ("When the functions of prosecutors and detectives are the same. . . . the immunity that protects them is also the same."). The Court finds, however, that an investigator or law enforcement officer is not functioning as a prosecutor when he or she decides which evidence to give to the prosecutor. Therefore, prosecutorial immunity does not shield defendants from liability under Count Two.

Count Three

Since the sufficiency of Count Three[7] is not argued by any Defendant in any brief, the Court will deny the Motions to Dismiss as to Count Three.[8]

Count Four

The Court holds that Count Four sufficiently states a claim upon which relief can be granted. In Count Four, Plaintiff alleges that Defendants Tate, Ikner, and Benson violated Plaintiff's rights under the Fourteenth Amendment to the United States Constitution by instigating and effectuating the malicious prosecution of Plaintiff. *First Amended Complaint* ¶ 47. Defendants raise two grounds for dismissal

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[7]Count Three reads as follows:

> The actions of defendants Tate, Ikner, and Benson . . . in intimidating, threatening, and pressuring witnesses to give false testimony, and the actions of defendants Tate, Ikner, and Benson in threatening and punishing potential witnesses to keep them from giving truthful exculpatory testimony, violated the plaintiff's rights under the Fourteenth Amendment to the United States Constitution.

First Amended Complaint at ¶ 46.

[8]The Court does note that Count Three is not barred by the statute of limitations. (*See* discussion of statute of limitations in *Count Two* section of text of this Opinion). The Plaintiff's Complaint was filed within two years of the discovery of his injury described in Count Three. *See e.g., First Amended Complaint* ¶ 23 (alleging discovery in August of 1991 that witness was pressured by Defendants into giving false testimony against Plaintiff).

of Count Four: the existence of probable cause and the lack of a disposition of the criminal proceedings in Plaintiff's favor. [9]

Probable Cause: The Court holds that Defendants' contention that they had "probable cause" to initiate criminal proceedings against Plaintiff does not defeat Plaintiff's claim under Count Four. The existence of probable cause in a malicious prosecution action is a fact-intensive question. *See, Delchamps, Inc. v. Larry*, 613 So. 2d 1235, 1238 (Ala. 1992) ("The existence of probable cause is determined from the facts of the specific case."). It is inappropriate for a court to decide factual issues on a motion to dismiss. Instead, a court must accept as true the factual allegations in the complaint. Assuming the Plaintiff's allegations in this case are true, the Court holds that a lack of probable cause is sufficiently alleged. Plaintiff alleges that the "prosecution of the plaintiff for murder was instigated, effectuated, and maintained by defendants Tate, Ikner, and Benson without probable cause,

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[9]State law defines the elements of a malicious prosecution action brought in federal court under § 1983. See, *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1563 (11th Cir. 1990) (referring to Alabama law to determine elements of malicious prosecution action under § 1983); See also, *Lippay v. Christos*, 996 F.2d 1490, 1502 (3rd Cir. 1993) ("In determining the elements of the common law tort [of malicious prosecution in a § 1983 case], we look to the law of the forum, in this case, Pennsylvania.").

To state a § 1983 claim for malicious prosecution in Alabama, a plaintiff must allege (1) a judicial proceeding initiated by the defendant; (2) *lack of probable cause*; (3) malice; (4) *disposition of the judicial proceeding favorable to the plaintiff*; and (5) damages. *N.A.A.C.P.*, 891 F.2d at 1563 (emphasis added to reflect issues raised by Defendants).

Since the "favorable disposition" element of Plaintiff's malicious prosecution claim was not satisfied until March 1993, just a few months before he filed suit, there can be no statute of limitations defense to Count Four.

using evidence and testimony they knew or should have known was false, and. suppressing and withholding important exculpatory evidence." *First Amended Complaint* ¶ 35. In other parts of the Complaint, Plaintiff specifies exactly which evidence was fabricated and which evidence was suppressed. These allegations are sufficient to satisfy the "lack of probable cause" element of a malicious prosecution claim.

Lack of Favorable Disposition: The Court holds that Plaintiff's Complaint satisfies the "favorable disposition" element of a malicious prosecution action. Defendants suggest that doubt exists as to whether the criminal proceedings against Plaintiff were terminated in the Plaintiff's favor. Plaintiff's Complaint, however, alleges that the State of Alabama dismissed the criminal charges against Plaintiff in March of 1993. *First Amended Complaint* ¶ 39. The dismissal of criminal charges is sufficient to meet the favorable disposition element of a malicious prosecution action. *See, Chatman v. Pizitz, Inc.*, 429 So. 2d 969, 971 (Ala. 1983). Therefore, Count Four meets the requirement that Plaintiff allege the criminal proceedings were terminated in his favor.

Count Five

The Court is puzzled by Count Five because it does not seem to allege a cause of action distinct from actions alleged in other Counts. Count Five states that Defendants Tate, Ikner, and Benson, in "instigating, effectuating, and maintaining the prosecution of the plaintiff without probable cause violated the plaintiff's rights under the Fourth and Fourteenth Amendments to the United States Constitution." *First Amended Complaint* ¶ 48. To the extent that Count Five alleges a malicious prosecution action, the Court has already

held that such a claim is viable. *See*, This Opinion's Analysis of Count Four. To the extent that Count Five alleges that Plaintiff was the victim of unconstitutional arrests, the Court refers the Parties to this Opinion's analysis of Count Six and Count Seven.

The Court does not think *Barts v. Joyner*, 865 F.2d 1187 (11th Cir.), *cert. denied*, 493 U.S. 831 (1989), bars Plaintiff's malicious prosecution claim. Defendant Tate cites Barts in a section of his brief devoted to Count Five. See, *Brief in Support of Sheriff Tate's Motion to Dismiss Amended Complaint* at 6. Defendant Tate cites *Barts* for the proposition that a law enforcement officer cannot be held liable for damages sustained by a plaintiff as the result of a malicious prosecution once the prosecutor takes the case from the law enforcement officer. Tate concedes, however, that *Barts* does allow a law enforcement officer to be liable where the prosecution was carried out as a result of "deception or undue pressure" by the defendant law enforcement officer. *Barts*, 865 F.2d at 1195. Tate contends that Plaintiff does not allege that he deceived the prosecutor in any way. However,, the Complaint alleges that Defendants Tate, Ikner, and Benson manufactured inculpatory evidence and suppressed exculpatory evidence. If Tate and the other Defendants provided the prosecutor with manufactured evidence and withheld from the prosecutor exculpatory evidence, they clearly deceived the prosecutor and can be held liable for damages sustained by Plaintiff even after the prosecutor took the case. Thus, the Court finds Plaintiff's allegations sufficient to state a malicious prosecution action.

Count Six

The Court holds that Count Six sufficiently states a claim upon which relief can be granted. In Count Six,

Plaintiff alleges that Defendants Tate, Ikner, and Benson violated Plaintiff's rights under the Fourth and Fourteenth Amendments to the United States Constitution by effectuating the arrest of Plaintiff pretextually for the crime of sodomy and by obtaining a warrant for that arrest. *First Amended Complaint* ¶ 49. Defendants raise two grounds for dismissal of Count Six: the existence of probable cause and the lack of involvement in the issuance of the warrant.[10]

Probable Cause: The Court holds that Defendants' contention that they had "probable cause" to effectuate the arrest of Plaintiff for sodomy does not defeat the claim against Defendants under Count Six. The existence of probable cause to make an arrest is a fact-intensive question. It is inappropriate for a court to decide factual issues on a motion to dismiss. Instead, a court must accept as true the factual allegations in the complaint. Assuming the Plaintiff's allegations in this case are true, the Court holds that a lack of probable cause is sufficiently alleged. Plaintiff alleges that he was arrested for sodomy based on an accusation by Ralph Myers that Defendants knew, or should have known, was false. *First Amended Complaint* ¶ 31. Plaintiff alleges that Defendants actually pressured Myers into concocting the accusation. *Id.* Plaintiff also alleges that Defendants caused an application for a Conecuh County arrest warrant for sodomy and a supporting affidavit to be submitted when they knew, or should have known, that the information in it was false and insufficient to establish probable cause. *Id.* Plaintiff

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[10]There is no statute of limitations defense to Count Six apparent on the face of the Complaint because Plaintiff alleges that he did not know the facts surrounding his arrest on the sodomy charge until August of 1991. *First Amended Complaint* ¶ 31. (*See* discussion of statute of limitations in *Count Two* section of text of this Opinion.).

alleges that Defendants deliberately omitted crucial exculpatory information from the warrant application and affidavit. *Id.* Plaintiff alleges that all these actions were taken in bad faith and for the purpose of constructing a case against Plaintiff for the crime of murder. *Id.* These allegations are sufficient to survive Defendants' Motions to Dismiss.

Lack of Involvement in the Issuance of the Warrant: Defendants' argument that they were not involved in the issuance of the warrant for the arrest of Plaintiff on the sodomy charge is also insufficient to warrant dismissal of Count Six. Once again, the Court must accept Plaintiff's allegations as true. Plaintiff alleges that Defendants "caused an application for a Conecuh County arrest warrant for sodomy" to be submitted. *First Amended Complaint* ¶ 31. Plaintiff also alleges that Defendants "instigated and planned the arrest of the plaintiff, and defendant Tate carried out the arrest." *Id.* Thus, according to Plaintiff's allegations, which must be accepted as true, Defendants were involved in all aspects of the arrest of Plaintiff on sodomy charges, including the issuance of the warrant.

Count Seven

The Court holds that Count Seven sufficiently states a claim upon which relief can be granted. In Count Seven, Plaintiff alleges that Defendants Tate, Ikner, and Benson violated Plaintiff's rights under the Fourth and Fourteenth Amendments to the United States Constitution under all the facts and circumstances alleged by effectuating the arrest of Plaintiff for the crime of murder, by obtaining a warrant for that arrest, and by continuing to incarcerate Plaintiff after that arrest. *First Amended Complaint* ¶ 50. Defendants claim they

had probable cause to effectuate the arrest of Plaintiff on the charge of murder.[11]

Probable Cause: The Court holds that Defendant's contention that they had probable cause to effectuate the arrest of Plaintiff for murder does not defeat the claim against Defendants under Count Seven. As mentioned in this Opinion's discussion of Count Six, the existence of probable cause is a fact-intensive question. The Court will not address the issue of probable cause on these Motions to Dismiss except to decide whether Plaintiff's Complaint sufficiently alleges a lack of probable cause. The Court finds that Plaintiff's Complaint does sufficiently allege a lack of probable. Plaintiff alleges that Defendants knew, or should have known, there was no probable cause for believing Plaintiff had committed the murder of Ronda Morrison. *First Amended Complaint* ¶ 32. Plaintiff alleges that Defendants caused an application and an affidavit to be submitted for a Monroe County arrest warrant when they knew, or reasonably should have known, the application and affidavit contained false information and were insufficient to establish probable cause. *Id.* Plaintiff also alleges that Defendants knowingly omitted crucial exculpatory information from the application and affidavit that would have demonstrated the absence of probable cause. *Id.* These allegations are sufficient to survive Defendants' Motions to Dismiss.

Count Eight

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[11]There is no statute of limitations defense to Count Seven apparent on the face of the Complaint. Plaintiff alleges that he was unaware of the facts which form the basis of Count Seven until August of 1991. *First Amended Complaint* ¶ 32. (See discussion of statute of limitations in *Count Two* section of text of this Opinion.).

The Court holds that Count Eight does not state a claim upon which relief can be granted. In Count Eight, Plaintiff alleges that "[t]he actions of defendant Tate in testifying before the Grand Jury in an effort to obtain an indictment against the plaintiff for murder violated the plaintiff's rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution." *First Amended Complaint* ¶ 51. Plaintiff concedes that such a claim is not cognizable in the Eleventh Circuit. *See, Strength v. Hubert*, 854 F.2d 421, 423-424 (11th Cir. 1988) (holding that grand jury witness was entitled to absolute immunity from 1983 liability for his grand jury testimony). Therefore, Count Eight is due to be dismissed.

Count Nine

Since the sufficiency of Count Nine[12] is not argued by any Defendant in any brief, the Court will deny the Motions to Dismiss as to Count Nine.[13]

Count Ten

Count Ten is due to be dismissed because it does not state a claim upon which relief can be granted. In Count Ten, Plaintiff makes the following allegations:

> Because defendant Tate's edicts and acts may fairly be said to represent official policy for defendant Monroe County, Alabama in matters of criminal investigation and law enforcement, and because the actions of defendants Tate and Ikner were undertaken as part of an unwritten policy and custom, attributable to the defendant

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[12]Count Nine reads as follows:

> The racially discriminatory motives of defendant Tate in instigating and effectuating the arrest and prosecution of the plaintiff, and the racially discriminatory remarks of defendant Tate to the plaintiff after the plaintiff was arrested, violated the plaintiff's rights under the Fourteenth Amendment to the United States Constitution.

First Amended Complaint at ¶ 52.

[13]The Court is not willing to consider the timeliness of Count Nine. It is up to the defense to raise the statute of limitations issue. *Fed. R. Civ. P.* 8(c). While Defendant Tate raises the statute of limitations defense against Plaintiff's claims generally, he does not argue the statute of limitations as to Count Nine specifically. As a result, Plaintiff does not argue the statutes of limitations issue as to Count Nine either. Under these circumstances, the Court finds that Defendant Tate does not sufficiently raise the statute of limitations defense in his Motion to Dismiss.

> Monroe County, Alabama, of withholding exculpatory information in criminal cases, of pressuring and threatening witnesses to give false testimony, of threatening and punishing potential witnesses to prevent them from giving truthful exculpatory testimony, and of instigating unwarranted and malicious criminal prosecutions, defendant Monroe County, Alabama is liable for all of the violations committed by defendant Tate as outlined in Counts One through Nine and for all of the violations committed by defendant Ikner as outlined in Counts one through Seven. For these same reasons, defendants Tate and Ikner are liable not only in their individual capacities, but in their official capacities as well.

First Amended Complaint ¶ 53. Plaintiff makes clear that he is not alleging county liability under a respondeat superior theory, which is not available in § 1983 cases. *See. Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978) ("[A] municipality cannot be held liable under § 1983 on a respondeat superior theory.") . *See also, Dean v. Barber*, 951 F. 2d 1210, 1215 (11th Cir. 1992). Instead, Plaintiff alleges two theories of county liability that have been held valid in § 1983 cases. *See, Parker v. Williams*, 862 F.2d 1471, 1478 (11th Cir. 1989) (discussing both theories). First, Plaintiff alleges the Defendant County is liable for the actions of Defendant Tate because Defendant Tate is a final

policymaker for the county in the area of law enforcement.[14] Second, Plaintiff alleges that the County is liable for the actions of Defendant Tate and Defendant Ikner because their unlawful behavior toward Plaintiff was in accordance with unlawful County policy.[15]

The Court holds that Monroe County cannot be liable for the actions of Defendants Tate and Ikner because Monroe County has no law enforcement authority. The Court bases its holding on the recent Eleventh Circuit decision in *Swint v. City of Wadley*, 5 F.3d 1435 (11th Cir. 1993), *modified*, 1994 WL 633 (11th Cir. 1994). In *Swint*, the plaintiffs brought a § 1983 action against Alabama law enforcement officials, an Alabama city, and an Alabama county for constitutional violations which allegedly occurred during raids on a nightclub. The plaintiffs alleged the county was liable for the unconstitutional acts of the county's sheriff because the sheriff exercised final policymaking authority for the county in matters of law enforcement. In judging the adequacy of this allegation, the *Swint* court looked first to see whether Alabama counties have any law enforcement authority for the sheriff to exercise. *Id.* at 1450 ("Alabama counties are 'authorized to do only those things permitted or directed by

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[14]Count Ten alleges the actions of Defendant Tate represent official policy for the Defendant County in matters of "criminal investigation and law enforcement." Because it seems to the Court that "criminal investigation" is simply one aspect, or a subset, of "law enforcement," the Court will refer in this Opinion only to "law enforcement."

[15]Suing Monroe County directly for the actions of Defendants Tate and Ikner, as Plaintiff does in Count Ten, is the same as suing Defendants Tate and Ikner in their official capacities as county representatives. *See, Parker v. Williams*, 862 F.2d 1471, 1476 n.4 (11th Cir. 1989). The Eleventh Amendment does not protect an Alabama county from liability under § 1983. *See Parker*, 862 F.2d at 1477.

the legislature of Alabama.'") (citation omitted). Since the plaintiff did not cite any statute or decision indicating that Alabama counties have law enforcement authority, the Court found that no such authority existed. *Id.* at 1450. Given this lack of county authority, the court found it unnecessary to take the next step and consider whether the sheriff was a person capable of making county policy. In granting summary judgment for the county, the court held that an Alabama sheriff "is not the final repository of [an Alabama county's] general law enforcement authority, because it has none." *Id.* at 1451.

Final Policymaker Theory: This Court finds *Swint* dispositive of the county liability issue in this case. As mentioned above, Plaintiff advances two theories for county liability. First, Plaintiff alleges that the County is liable because Defendant Tate exercises final policymaking authority for the County in law enforcement matters. According to *Swint*, this allegation states a claim only if the County has some authority in the area of law enforcement. *Id.* at 1450. To determine whether an Alabama county has law enforcement authority, *Swint* advises litigants to look to statutes and case law. *Id.* If no statute or case indicates that an Alabama county has law enforcement authority, then no such authority exists. *Id.* Like the plaintiffs in *Swint*, the Plaintiff in this case fails to cite the Court to a statute or case that indicates that an Alabama county possesses law enforcement authority.[16] Therefore, Plaintiff's final policymaker theory of county liability must fail, just as the same theory failed in *Swint*.

[16]Later in this Opinion, the Court will discuss the statutes Plaintiff does cite.

Unlawful County Policy Theory: Plaintiff's second theory of county liability is also insufficient. Under his second theory, Plaintiff alleges that the County is liable for the actions of Defendant Tate and Defendant Ikner because their unlawful behavior toward Plaintiff was in accordance with unlawful County policy.[17] According to *Swint*, however, an Alabama county can have no policy concerning law enforcement unless it has the authority to make such policy. *Id.* at 1450-1451. As mentioned above, Plaintiff cites no statute or decision indicating that an Alabama county has authority to make policy in the area of law enforcement. Therefore, any unlawful acts of Defendants Tate and Ikner cannot be said to represent the Defendant County's policy.

Plaintiff's Arguments: The court does not find any of Plaintiff's arguments regarding *Swint* persuasive.[18] Plaintiff argues first that Swint does not control this case because Plaintiff in this case, unlike the plaintiffs in Swint,

[17]Specifically, Count Ten alleges that the Defendant County maintains a policy of "withholding exculpatory information in criminal cases, of pressuring and threatening witnesses to give false testimony, of threatening and punishing potential witnesses to prevent them from giv[ing] truthful exculpatory testimony, and of instigating unwarranted malicious and criminal prosecutions." *First Amended Complaint* at ¶ 53. To the extent that this alleged County policy is carried out by Defendant Tate (a sheriff) and Defendant Ikner (an investigator in the district attorney's office), the Court finds the policy to be a *law enforcement* policy. Therefore, the Court reviews the sufficiency of the allegations in Count Ten with the understanding that the alleged unlawful County policy is a law enforcement policy.

[18]In a letter to the Court dated December 24, 1993, Plaintiff offered its interpretation of the *Swint* decision and advanced several arguments for why *Swint* is not controlling in this case.

cites to statutes indicating that Alabama counties have law enforcement authority. *See, Plaintiff's Response in opposition to Monroe County's Motion to Dismiss First Amended Complaint* at 7-11 (citing and quoting several Alabama statutes). The Court finds the statutes cited by Plaintiff insufficient to bestow upon the County any policymaking authority in matters of law enforcement. Plaintiff cites the Court to statutes that generally limit the sheriff's duties to a particular county, *See, e.g., Ala. Code* § 3622-3; a statute that directs the county to pay the sheriff's salary,; *Ala. Code* § 36-22-16; and a statute that directs the county to provide the sheriff an office and to pay his expense; *Ala. Code* § 36-22-18. While these statutes establish certain links between Alabama counties and sheriffs, the statutes do not give Alabama counties any authority to control law enforcement.[19]

The second argument Plaintiff makes regarding *Swint* also is not persuasive. Plaintiff contends that *Swint* advises against deciding the issue of county liability on a motion to dismiss. Plaintiff argues that he should have a chance to submit evidence in support of his theories for county liability. He points out that there was a city liability issue in the *Swint* case as well as a county liability issue. With respect to the

[19]Compare the case at bar to *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989), a case cited by Plaintiff in which the Eleventh Circuit found that an Alabama county may be liable for the actions of the sheriff in operating the county jail. County liability in that case depended upon whether the county had authority over the jail. The court found that the county did have such authority. However, the court based its findings largely on an Alabama statute which gave the county "control over the jail." *Id.* at 1479. The court found that the county could be liable because "[the county], not the state, has the responsibility for running the county jail under Alabama law." *Id.* In contrast, Plaintiff in this case can point to no authority establishing Monroe County's "control" over criminal investigation or law enforcement.

city, the Eleventh Circuit declined to reverse the district court's denial of summary judgment. The court held that it was inappropriate to decide the question of whether the city police chief was a final policymaker for the city because there was "no evidence in the record concerning the 'relevant customs and practices having the force of law' which would define the distribution of law enforcement authority between the City and the [police chief]." *Swint*, 5 F.2d at 1452.

Plaintiff argues that the *Swint* decision with respect to the city should prevent this Court from disposing of Plaintiff's county liability claim without the benefit of any evidence. The Court disagrees. *Swint* clearly holds that any government entity must have law enforcement authority in order to be liable for the law enforcement actions of a government official. Once it is decided that a government entity does have law enforcement authority, then it is appropriate to address the question of who makes policy for the government entity pursuant to its law enforcement authority. In *Swint*, the Eleventh Circuit held that an Alabama *county* has no law enforcement authority. That holding controls this case. The Eleventh Circuit either found or assumed (because it was obvious)[20] that an Alabama *city* has law enforcement authority. Only after it was satisfied that Alabama cities have law enforcement authority did the Eleventh Circuit deem it necessary to consider evidence regarding the city police chief's ability to exercise that authority.

[20]Alabama statutory law makes it clear that cities have law making and law enforcement authority. *See, e.g., Ala. Code* § 11-45-1 (giving cities power to adopt and enforce ordinances).

Thus, *Swint* unequivocally requires this Court to first consider whether a county has authority in matters of law enforcement. This Court's finding that a county has no such authority is dispositive of the county liability issue in this case. The Court sees no reason to allow Plaintiff a chance to submit evidence in support of a claim that is clearly insufficient. Plaintiff's final argument with respect to the *Swint* case also fails to persuade the Court. Plaintiff attempts to distinguish *Swint* by noting that the county commission was the defendant in that case, while the county itself is the defendant in this case. If the distinction the Plaintiff draws has any relevance, the *Swint* court failed to recognize it. In *Swint*, the Eleventh Circuit used "county" and "county commission" interchangeably. The Court even announced its holding using the term "county:" "We hold that [the sheriff] is not the final repository of Chambers County's general law enforcement authority, because it has none." *Swint*, 5 F.3d at 1451. Like the *Swint* court, this Court holds that Defendant Tate and Defendant Ikner are not final repositories of Monroe County's general law enforcement authority, because it has none. Therefore, Monroe County's Motion to Dismiss is due to be granted as to Count Ten. Likewise, Plaintiff's attempt to characterize Defendants Tate and Ikner as county, rather than state,[21] officials fails, and Plaintiff's official capacity claim against these Defendants is due to be dismissed.

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[21]In Alabama, sheriffs are executive officers of the state. Ala. Const. of 1901, art. V, § 112; *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989). Employees of a district attorney are state employees. *Ala. Code.* § 12-17-220(a) (1975); *Hooks v. Hitt*, 539 So.2d 157, 159 (Ala. 1988).

Counts Eleven through Nineteen

Counts Eleven through Nineteen are due to be dismissed because they fail to state claims upon which relief can be granted. Counts Eleven through Nineteen, which are based on the same facts as Counts One through Nine, allege that Defendants Tate, Ikner, Benson, and Barnett committed numerous violations of the Alabama Constitution and of various Alabama statutes, rules, and regulations. Plaintiff, however, is unable to cite the Court to any Alabama authority similar to § 1983 in the federal context that grants Plaintiff the right to bring an action for money damages against a state actor based solely on violations of these provisions of state constitutional or statutory law. Therefore, Counts Eleven through Nineteen are due to be dismissed.

Count Twenty

The Court holds that Count Twenty sufficiently states a claim upon which relief can be granted. In Count Twenty, Plaintiff alleges that Defendants Tate, Ikner, and Benson committed the Alabama common law tort of malicious prosecution by "instigating and effectuating the arrest and prosecution of the plaintiff." *First Amended Complaint* at ¶ 63. Defendants raise five grounds for dismissal of Count Twenty: the statute of limitations, existence of probable cause, lack of a disposition of the criminal proceedings in Plaintiff's favor, absolute immunity, and qualified immunity.

Statute of Limitations: There is no statute of limitations defense to Count Twenty. The statute of limitations for a malicious prosecution action in Alabama is two years. *Ala. Code* § 6-2-38(h). The limitations period does not begin to run until the criminal proceedings against

the plaintiff are terminated. *Blake v. Barton Williams, Inc.*, 361 So. 2d 376, 378-379 (Ala. Civ. App. 1978). Plaintiff alleges that the criminal proceedings against him were terminated in March of 1993. *First Amended Complaint* at ¶ 39. This suit was filed a few months later. Therefore, Plaintiff's malicious prosecution claim is timely.

Probable Cause and Lack of a Favorable Disposition: Neither of these grounds allows dismissal of Count Twenty. Defendants raised these same grounds against Plaintiff's § 1983 malicious prosecution action in Count Four. Because these grounds attack specific elements of a malicious prosecution claim,[22] and because state law defines the elements of a malicious prosecution claim brought under § 1983,[23] the discussion of these grounds in the context of § 1983 (Count Four) applies just as well here in the Alabama common law context (Count Twenty). The Court held these grounds insufficient under Count Four; therefore, they are insufficient here under Count Twenty.

Absolute immunity and Qualified immunity: The Court holds that Plaintiff's allegations are sufficient to

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[22]The elements of a malicious prosecution claim in Alabama are as follows: (1) a prior judicial proceeding; (2) instigated by the defendant; (3) *lack of probable cause*; (4) malice; (5) *termination of the judicial proceeding favorably to the plaintiff*; and (6) damages. *Robinson v. McPherson*, 602 So.2d 352, 354 (Ala. 1992) (emphasis added to reflect the defenses raised by Defendants).

[23]See, *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1563 (11th Cir. 1990) (referring to Alabama law to determine elements of malicious prosecution action under § 1983); *See, also, Lippay v. Christos*, 996 F.2d 1490, 1502 (3rd. Cir. 1993) ("In determining the elements of the common law tort [of malicious prosecution in a § 1983 case], we look to the common law of the forum, in this case, Pennsylvania.")

overcome Defendants' contention that they are immune from all of Plaintiff's state law claims under Article I, § 14, of the Alabama Constitution.[24] The Court bases this holding on the case of *Phillips v. Thomas*, 555 So. 2d 81 (Ala. 1989).

In *Phillips*, like this case, the plaintiffs brought a tort action against state employees, and the state employees raised the defenses of absolute and. qualified immunity. In the *Phillips* opinion, the Alabama Supreme Court indicates that although absolute immunity and qualified (or "substantive") immunity are two distinct defenses, they both derive from the state's sovereign immunity which is established by Article I, § 14, of the Alabama Constitution. Before discussing the absolute immunity and qualified immunity defenses, the court devotes a section of the opinion to the more fundamental concept of sovereign immunity. *Id.* at 83. In this section entitled "When Sovereign Immunity is not Available," the court, referring to individual tort liability, states that "[c]learly, a state officer or employee is not protected by § 14 when he acts willfully, maliciously, illegally, fraudulently, in bad faith, beyond his authority, or under a mistaken interpretation of the law." *Id.*

Plaintiff's Complaint clearly alleges willful, malicious, and illegal behavior by Defendants in connection with Plaintiff's arrest and prosecution. *See, First Amended Complaint* ¶ 22 (alleging that Defendants withheld exculpatory evidence); ¶ 26 (alleging that Defendants coerced certain persons into testifying falsely against Plaintiff); ¶ 31 (alleging that Defendants fabricated charges against Plaintiff to obtain an arrest warrant). Since the sovereign immunity

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[24]"[T]he State of Alabama shall never be made a defendant in any court of law or equity."

concept encompasses both absolute and qualified immunity, Plaintiff's allegations of willful, malicious, and illegal behavior are sufficient to overcome both the absolute and qualified immunity defenses to the individual capacity claims. Thus, Count Twenty survives Defendants' Motions to Dismiss.

Count Twenty-one

The Court holds that Count Twenty-one sufficiently states a claim upon which relief can be granted.[25] In Count Twenty-One, Plaintiff alleges that Defendants Tate, Ikner, and Benson committed the tort of abuse of process by "instigating and effectuating the arrest and prosecution of the plaintiff." *First Amended Complaint* at ¶ 64. Defendants contend that Count Twenty-One is insufficient because it doesn't contain an allegation that the Defendants used an arrest warrant for an improper purpose.[26]

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[25]The Court is not willing to consider the timeliness of Count Twenty-One. It is up to the defense to raise the statute of limitations issue. *F. R. Civ. P.* 8(c). While all the Defendants raise the statute of limitations defense against Plaintiff's claims generally, no Defendant argues the statute of limitations as to Count Twenty-One specifically. As a result, Plaintiff does not argue the statute of limitations issue as to Count Twenty-One either. Under these circumstances, the Court finds that Defendants do not sufficiently raise the statute of limitations defense in their Motions to Dismiss.

[26]The elements of the tort of abuse of process are (1) malice; (2) the existence of an ulterior purpose; and (3) *an act in the use of process not proper in the regular prosecution of the proceedings. Drill Parts and Service Co. v. Joy Mfg.*, 619 So.2d 1280, 1286 (Ala. 1993) (emphasis added to reflect the defense raised by Defendants).

The Court finds that Plaintiff sufficiently alleges that Defendants used at least the first arrest warrant, the one for sodomy, for an improper purpose. Plaintiff alleges that Defendants used the first arrest warrant to "obtain custody of the plaintiff in order to construct evidence against him on the murder charge." *First Amended Complaint* at ¶ 31. Plaintiff further alleges that the Defendants "timed the arrest of the plaintiff so they could pick him up while he was driving his truck, impound the truck and take it to the Monroe County jail, and have Bill Hooks, Jr. look at the truck so he could then describe it as the truck he saw outside the Jackson Cleaners on the morning of the murder." *Id.* Such behavior by the Defendants is an improper use of an arrest warrant.[27] Thus, Count Twenty-One survives Defendants' Motions to Dismiss.

County Twenty-Two

The Court holds that Count Twenty-Two does not state a claim upon which relief can be granted. In Count Twenty-Two, Plaintiff alleges that Defendants Tate, Ikner, and Benson committed the tort of false imprisonment[28] by causing the incarceration of Plaintiff on death row while he was a pretrial detainee. *First Amended Complaint* at ¶ 65. Plaintiff cites, and the Court finds, no authority for the proposition that holding a pretrial detainee in one prison cell

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[27]Such behavior is also sufficient to overcome sovereign immunity. Plaintiff's allegations certainly describe behavior that is "willful, malicious, and illegal." *See*, Court's Discussion of Absolute Immunity and Qualified Immunity under *Count Twenty*.

[28]"False imprisonment consists in the unlawful detention of the person of another for any length of time whereby he is deprived of his personal liberty." *Ala. Code* § 6-5-170.

instead of another constitutes the tort of false imprisonment. Therefore, Count Twenty-Two is due to be dismissed.

Count Twenty-Three

The Court holds that Plaintiff does not state a claim for false imprisonment in Count Twenty-Three. In Count Twenty-Three, Plaintiff alleges that Defendants Tate, Ikner, and Benson committed the tort of false imprisonment by "instigating and effectuating the incarceration of the plaintiff for a crime he did not commit." *First Amended Complaint* ¶ 66. In defense, Defendants cite cases that stand for the proposition that a plaintiff who is arrested pursuant to a valid warrant issued by an authorized official is not entitled to recover damages for false imprisonment.

The Court finds the cases cited by Defendants controlling in this case. The Court finds *Goodwin v. Barry Miller Chevrolet, Inc.*, 543 So. 2d 1171 (Ala. 1989), particularly persuasive. In *Goodwin*, the plaintiff sued two persons for false imprisonment. The plaintiff alleged that defendants lacked probable cause for believing that plaintiff had committed a crime but, nevertheless, caused a warrant for plaintiff's arrest to issue. As a result of the defendants' actions, the plaintiff was arrested, kept in custody overnight, prosecuted and found not guilty. The Alabama Supreme Court affirmed the trial court's grant of summary judgment to defendants and stated

> [Plaintiff] was arrested and jailed under a warrant properly issued by a magistrate. The fact that there is a controversy over whether [defendants] had reasonable cause to have the warrant issue does not affect the underlying validity of the warrant itself.

Id. at 1176. The court went on to quote the Alabama Court of Civil Appeals as follows:

> [If] an arrest is made pursuant to a warrant issued by a lawfully authorized person, neither the arrest nor the subsequent imprisonment is "false," and, as a consequence, the complaining party's action must be one for malicious prosecution.

Id. (*quoting*, *Blake v. Barton Williams, Inc.*, 361 So. 2d 376, 378 (Ala. Civ. App. 1978). In the present case, Plaintiff does not allege that the arrest warrants were issued by persons without authorization. Therefore, *Goodwin* controls, and the Court must hold that Plaintiff fails to state a claim for false imprisonment.[29] Thus, Count Twenty-Three is due to be dismissed.

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[29]The Court does note one difference between *Goodwin* and the case at bar. In *Goodwin*, the Alabama Supreme Court indicated that there was a controversy over whether the defendants had reasonable cause to have the arrest warrant issued. However, the court did not say that defendants were alleged to have provided the magistrate with information they knew was false in order to have the warrant issued. In the present case, Plaintiff alleges that Defendants knowingly used false information as the basis for their warrant applications. See, *First Amended Complaint* ¶¶ 31 and 32. The Court speculates that this difference could be a significant enough to allow a false imprisonment claim in a case such as the instant one. However, Plaintiff fails to cite, and the Court does not find, a case where an Alabama court allowed a false imprisonment claim where the plaintiff alleged that the defendant knowingly supplied the issuing authority with false information. Thus, the Court finds that Count Twenty-Three fails to state a cognizable claim.

Count Twenty-Four

Count Twenty-Four fails to state a claim upon which relief can be granted. In Count Twenty-Four, Plaintiff alleges that Defendants Tate, Ikner, Benson, and Barnett committed the tort of fraud under *Ala. Code* § 6-5-102[30] by "withholding and suppressing exculpatory evidence from the plaintiff when they had a duty to turn it over to the plaintiff." *First Amended Complaint* ¶ 67. Defendants argue that Plaintiff's fraud claim is insufficient because it fails to allege reliance by Plaintiff. Plaintiff seems to concede that he does not allege reliance, but he contends that reliance is not a necessary element of a claim under § 6-5-102. The Alabama Supreme Court has held, however, that reliance is indeed a necessary element of a claim under § 6-5-102. *Crowder v. Memory Hill Gardens, Inc.*, 516 So. 2d 602, 605 (Ala. 1987). Thus, Plaintiff's allegations under Count Twenty-Four fail to state a valid claim.

Count Twenty-Five

The Court holds that Count Twenty-Five is barred by the statute of limitations as to Defendants Ikner and Benson. However, Count Twenty-Five is not barred by the statute of limitations as to Defendant Tate. In Count Twenty-Five, Plaintiff alleges that Defendants Tate, Ikner, and Benson committed the tort of outrage, also known as intentional infliction of emotional distress, by causing the incarceration of Plaintiff on death row while he was a pretrial detainee.

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[30]"Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." *Ala. Code* § 6-5-102.

First Amended Complaint ¶ 68. The only ground for dismissal argued as to Count Twenty-Five is the statute of limitations.[31] *See, Motion Brief in Support of Motion to Dismiss for Defendants Ikner and Benson* at 5. In response, Plaintiff cites a statute that contains a ten-year limitations period. *Ala. Code* 6-2-33(3).[32] The Court finds that the normal two-year statute of limitations for outrage claims applies to Defendants Ikner and Benson so as to bar Plaintiff Is claim under Count Twenty-Five as to them. However, the Court finds that the ten-year statute of limitations applies to Defendant Tate so that Count Twenty-Five can be maintained against him.

The Normal Two-Year Statute of Limitations: If not for the ten-year limitations period contained in *Ala. Code* § 6-2-33(3), Count Twenty-Five would be barred by the statute of limitations as to every Defendant. The statute of limitations for the tort of outrage is normally two years. *Archie v.*

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[31]As the Court has already mentioned, the Defendants raise sovereign immunity as a defense to all the state law claims. *See*, Court's Discussion of Absolute and Qualified Immunity under *Count Twenty*. The sovereign immunity defense does not defeat Count Twenty-Five. State officers are not entitled to sovereign immunity if their tortious conduct is "willful" or "malicious." *Id.* Plaintiff's Complaint clearly alleges that Defendants' conduct was willful and malicious when they incarcerated Plaintiff on death row as a pretrial detainee. *See, First Amended Complaint* ¶ 19 ("This pretrial detention of the Plaintiff on Death Row, under the existing conditions on Death Row, amounted to punishment. Moreover, it was intended for the purpose of punishing and intimidating the plaintiff, and was done vindictively and maliciously by the [Defendants]."). Thus, Plaintiff sufficiently states a claim under Count Twenty-Five to survive the sovereign immunity defense.

[32]"The following must be commenced within 10 years: . . . (3) Motions and other actions against sheriffs, coroners, constables, and other public officers for nonfeasance, misfeasance, or malfeasance in office."

Enterprise Hosp. and Nursing Home, 508 So.2d 693, 695 (Ala. 1987). For a continuous[33] tort, such as the outrage claim alleged in Count Twenty-Five, the plaintiff can recover for any damages that occurred within the period of limitations. *Garrett v. Raytheon Co., Inc.*, 368 So. 2d 516, 521 (Ala. 1979); *See also, Continental Casualty Ins. Co. v. McDonald*, 567 So. 2d 1208, 1215-1217 (Ala. 1990) (discussing statute of limitations of an outrage claim based on a continuous tort). In this case, Plaintiff was convicted of capital murder in August of 1988 and sentenced to death in September of 1988. *First Amended Complaint* at *Introduction*. Once a prisoner is sentenced to death, it certainly is appropriate to put that prisoner on death row. Thus, any outrage claim Plaintiff may have for the allegations in Count Twenty-Five must be based on injuries incurred by Plaintiff on or before September 1988.

Since Plaintiff's Complaint was filed on June 4, 1993, over four years after September of 1988, none of Plaintiff's injuries under Count Twenty-Five occurred within the two-year statute of limitations for outrage claims. Normally, therefore, Plaintiff's claim under Count Twenty-Five would be totally barred. Nevertheless, Count Twenty-Five is still viable against any Defendants to whom the ten-year statute of limitations of § 6-2-33(3) applies.

The Ten-Year Statute of Limitations: The Court finds that the ten-year limit of § 6-2-33(3) applies to Defendant Tate, but not to Defendants Ikner and Benson. Section 6-2-33(3)

[33]"[The Alabama Supreme Court] has used the term 'continuous tort' to describe a defendant's repeated tortious conduct which has repeatedly and continuously injured a plaintiff." *Moon v. Harco Drugs, Inc.*, 435 So.2d 218, 220 (Ala. 1983). The Court finds that Plaintiff's allegation that he was incarcerated on death row for an extended period of time describes a continuous tort, if it describes an actionable tort at all.

sets a ten-year limitations period for "[m]otions and other actions against sheriffs, coroners, constables and other public officers for nonfeasance, misfeasance, or malfeasance in office." This statute, on its face, applies to sheriffs. Therefore, at least at this stage of these proceedings, the Court holds that it applies to Defendant Tate who is a sheriff.

The Court does not apply the ten-year statute of limitations to Defendants Ikner and Benson, although they could conceivably be covered by the "other public officers" language contained in § 6-2-33(3). The former Fifth Circuit has construed the "other public officers" language of § 6-2-33(3) to exclude city council members. *Nathan Rodgers Constr. v. City of Saraland*, 670 F.2d 16 (5th Cir. Unit B 1982).[34] That court reasoned that city council members were not sufficiently similar to sheriffs, coroners, and constables who "perform ministerial duties that involve handling or collecting public and private funds, or that otherwise carry a high degree of trust." *Id.* at 20. This Court thinks the same reasoning applies to an investigator for the district attorney (Defendant Ikner) and an investigator for the Alabama Bureau of Investigation (Defendant Benson). Furthermore, it appears to the Court that Defendants Ikner and Benson are "employees," rather than "officers," in the ordinary meaning of those terms. The statute does not refer to employees of public officers. Thus, this Court holds that Defendants Ikner and Benson are not public officers who are covered by the ten-year statute of limitations of § 6-2-33(3).

[34]In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982), the Eleventh Circuit adopted as binding precedent all decisions issued by any Unit B panel of the Fifth Circuit after October 1, 1981.

Thus, the Court dismisses Count Twenty-Five as it applies to Defendants Ikner and Benson on the grounds that the two-year statute of limitations for the tort of outrage has expired. The Court does not dismiss Count Twenty-Five as it applies to Defendant Tate because the ten-year statute of limitations that applies to him has not expired.

Count Twenty-Six

The Court holds that Count Twenty-Six survives Defendants, Motions to Dismiss. In Count Twenty-Six, Plaintiff alleges that Defendants Tate, Ikner, and Benson committed the tort of outrage by "instigating and effectuating the arrest, incarceration, and prosecution of the plaintiff for a crime he did not commit." *First Amended Complaint* ¶ 69. The only ground argued as to Count Twenty-Six is the statute of limitations.[35] The Court finds that the two year statute of limitations for outrage claims, based on the facts alleged in

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[35]As the Court has already mentioned, the Defendants raise sovereign immunity to all the state law claims. *See*, Court's Discussion of Absolute and Qualified Immunity under *Count Twenty*. The sovereign immunity defense does not defeat Count Twenty-Six. State officers are not entitled to sovereign immunity when their tortious conduct is "willful" or "in bad faith." *Id.* Count Twenty-Six sufficiently alleges conduct that was "willful" and "in bad faith." See, *e.g.*, *First Amended Complaint* ¶ 35 ("The prosecution of the plaintiff for murder was instigated, effectuated, and maintained by Defendants Tate, Ikner, and Benson without probable cause, using evidence and testimony they knew or should have known was false, and suppressing and withholding important exculpatory evidence."); *See also*, *First Amended Complaint* ¶ 4 ("The actions of all the various defendants--actions that are described in this complaint--were done willfully, wantonly, maliciously, and in gross and reckless disregard of the rights of the plaintiff under the Constitution of the United States, and the Constitution, statutes, and common law of the State of Alabama."). Thus, Plaintiff sufficiently states a claim under Count Twenty-Six to survive the sovereign immunity defense.

this Count, has not expired. Therefore, Count Twenty Six is still viable.

As mentioned above in the Court's discussion of Count Twenty-Five, the statute of limitations for the tort of outrage is two years. For a continuous tort, such as the outrage claim alleged in Count Twenty-Six, the plaintiff can recover for any damages that occurred within the period of limitations. In this case, Plaintiff was allegedly incarcerated until March of 1993 for a crime he did not commit. *See, First Amended Complaint* ¶ 39. This lawsuit was filed on June 4, 1993. Thus, if the allegations in Count Twenty-Six do amount to tortious conduct, Plaintiff has a claim. Plaintiff may recover from Defendants Ikner and Benson for any injuries that he sustained after June 4, 1991.

With respect to Defendant Tate only, Plaintiff may recover for all of his injuries resulting from his arrest, incarceration, and prosecution for a crime he did not commit. This is true because the ten-year statute of limitations of § 6-2-33(3) applies to Defendant Tate for reasons expressed in this Court's discussion of Count Twenty-Five.

Thus, Count Twenty-Six survives the statute of limitations defense as to Defendants Tate, Ikner, and Benson. Plaintiff may recover from Defendants Ikner and Benson damages for any injuries sustained by Plaintiff after June 4, 1991. Plaintiff may recover from Defendant Tate damages for all injuries sustained by Plaintiff resulting from conduct alleged in Count Twenty-Six.

Count Twenty Seven

The Court holds that Count Twenty-Seven fails to state a claim upon which relief can be granted. In Count Twenty-Seven, Plaintiff makes the following allegations:

> Because defendant Tate and defendant Ikner are employees of defendant Monroe County, Alabama; because defendant Tate's edicts and acts may fairly be said to represent official policy for defendant Monroe County, Alabama in matters of criminal investigation and law enforcement; and because the actions of defendants Tate and Ikner were undertaken as part of an unwritten policy and custom, attributable to the defendant Monroe County, Alabama, of withholding exculpatory information in criminal cases, of pressuring and threatening witnesses to give false testimony, of threatening and punishing potential witnesses to prevent them from giving truthful exculpatory testimony and of instigating unwarranted and malicious criminal prosecutions; defendant Monroe County, Alabama is liable for all of the violations and torts committed by defendant Tate as outlined in Counts Eleven through Twenty-Six and for all of the violations and torts committed by defendant Ikner as outlined in Counts Eleven through Seventeen and Counts Twenty through Twenty-Six.

First Amended Complaint ¶ 70. Defendants argue that Monroe County cannot be liable for the actions of Defendants Tate and Ikner because the County has no law enforcement authority. The Court agrees with Defendants.

First Theory of County Liability: In Count Twenty-Seven, Plaintiff seems to advance three theories of county liability. The first theory is that the Defendant County is liable for the actions of Defendants Tate and Ikner "[b]ecause defendant Tate (a sheriff) and defendant Ikner (an investigator for the district attorney) are employees of defendant Monroe County, Alabama." *First Amended Complaint* ¶ 70. The Court understands this first theory to be based on the concept of respondeat superior. However, the Alabama Supreme Court has held that "[a] sheriff is not an employee of a county for purposes of imposing liability on the county under the theory of respondeat superior." *Parker v. Amerson*, 519 So. 2d 442, 442 (Ala. 1987). This Court thinks the same rule would apply to an investigator in the district attorney's office. *See*, *Hooks v. Hitt*, 539 So. 2d 157 (Ala. 1988) (holding that investigators for district attorneys are state employees). Therefore, Plaintiff's first theory of county liability fails.

Second and Third Theories of County Liability: Plaintiff's second and third theories of county liability also fail. According to Plaintiff's second theory,. the Defendant County is liable "because defendant Tate's edicts and acts may fairly be said to represent official policy for defendant Monroe County, Alabama in matters of criminal investigation and law enforcement."[36] *First Amended Complaint* ¶ 70. Under Plaintiff's third theory, the Defendant County is liable "because the actions of defendants Tate and Ikner were undertaken as part of an unwritten policy and custom,

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[36]Count Twenty-Seven alleges the actions of Defendant Tate represent official policy for the Defendant County in matters of "criminal investigation and law enforcement." Because it seems to the Court that "criminal investigation" is simply one aspect, or a subset, of "law enforcement," the Court will refer in this Opinion only to "law enforcement."

attributable to the defendant Monroe County, Alabama, of withholding exculpatory information in criminal cases, of pressuring and threatening witnesses to give false testimony, of threatening and punishing potential witnesses to prevent them from giving truthful exculpatory testimony, and of instigating unwarranted and malicious criminal prosecutions." *Id.* Plaintiff offers no state law authority to support these two theories.

The Defendant County, on the other hand, offers state authority that the Court finds dispositive of the second and third theories under Count Twenty-Seven. The Defendant County cites the Alabama Supreme Court decision in *King v. Colbert County*, 620 So. 2d 623 (Ala. 1993). In *King*, a prisoner who received an electrical shock from a defective outlet in a county jail brought an action for damages against the county sheriff and the county. The Alabama Supreme Court held that the county could not be held liable for the actions of the sheriff:

> The sheriff's authority over the jail is totally independent of the [county] [c]ommission. Therefore, even if [the sheriff] can be held liable for his conduct as sheriff of [the county], [the county] itself cannot be held vicariously liable for his actions or inaction.

Id. at 625. Nevertheless, the court went on to hold that the county could be held liable for the effects of the defective outlet because Alabama counties had been given, by statute, the duty to maintain their county jails: "Each county within the state shall be required to maintain a jail within their county." *Ala. Code* § 11-14-10.

This Court understands the *King* decision to mean that an Alabama county cannot be held liable for the actions of a state official unless the county has statutory authority over the area of government in which the official acted. In this case, Plaintiff attempts to state a claim against Defendant Monroe County for the law enforcement actions of Defendant Tate, a sheriff, and Defendant Ikner, an investigator for the district attorney's office. Plaintiff, however, fails-to cite the Court to a statute granting Alabama counties law enforcement authority. Thus, the Court finds that Plaintiff's second and third theories of county liability must fail.

Since Plaintiff can offer no authority supporting his claim for county liability, the court holds that Count Twenty-Seven is due to be dismissed as to Monroe County. To the extent that Count Twenty-Seven may assert an official capacity claim against Defendants Tate and Ikner, Count Twenty-Seven is due to be dismissed as to them also.

CONCLUSION

For the foregoing reasons, the following claims survive Defendants' Motions to Dismiss and remain:

1. Tom Tate - 42 U.S.C. § 1983 claims against him in his individual capacity contained in Counts One, Two, Three, Four, Five, Six, Seven, and Nine, and state law claims against him in his individual capacity contained in Counts Twenty, Twenty-One, Twenty-Five and Twenty-Six.

2. Larry Ikner - 42 U.S.C. § 1983 claims against him in his individual capacity contained in Counts One, Two,

Three, Four, Five, Six, and Seven, and state law claims against him in his individual capacity contained in Counts Twenty, Twenty-One, and Twenty-Six.

3. Simon Benson - 42 U.S.C. § 1983 claims against him in his individual capacity contained in Counts One, Two, Three, Four, Five, Six, and Seven, and state law claims against him in his individual capacity contained in Counts Twenty, Twenty-One, and Twenty-Six.

4. Mike Barnett - 42 U.S.C. §1983 claim against him in his individual capacity contained in Count Two.

All other claims are due to be DISMISSED. A separate order will be entered in accordance with this Memorandum Opinion.

DONE, this 18th day of February, 1994.

/s/ W. Harold Albritton, III
W. HAROLD ALBRITTON, III
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WALTER MCMILLIAN,	)	
	)	CASE NO.
Plaintiff,	)	CV-93-A-699
	)	
vs.	)	
	)	
W.E. JOHNSON, ET AL,	)	
	)	
Defendants.	)	

ORDER
(Filed December 13, 1993)

This case is before the Court on the Motion to Intervene filed by the Association of County Commissions of Alabama Liability Self-Insurance Fund ("Fund").

The Fund seeks permissive intervention under Rule 24(b), *Fed. R. Civ. P.*

The Fund asserts that it issued its "Liability Self Insurance Plan Document" to the Monroe County Commission for the period February 1, 1992 to January 1, 1993, renewed on January 1, 1993, for a period of one year. The plan provides claims-made coverage which may cover the Defendants Monroe County and Tom Tate, as Sheriff of Monroe County or individually, as to some, but not all, of the claims made against them in this suit. Since a trial of this case could possibly result in a verdict against these Defendants which would leave

uncertain the specific claims upon which liability was based and, therefore, would leave uncertain the question of whether the Fund should provide indemnity based on the verdict, the Fund asks this Court to adopt the bifurcated trial procedure created for situations such as this by the Alabama Supreme Court in the case of *Universal Underwriters Insurance Co. v. East Central Alabama Ford-Mercury, Inc.*, 574 So.2d 716 (Ala. 1991), which states as follows:

> Under this alternative procedure for permissive intervention, the trial would be bifurcated. In the first phase of the trial, the jury or judge would resolve issues of liability between the plaintiff and the insured defendant. The second phase would occur only if the jury or judge in the first phase rendered a verdict or judgment against the insured defendant. In the second phase, the insurance company would be allowed to enter and try, before the same judge or jury, only the insurance coverage issue.

The plaintiff has objected to the Motion to Intervene.

There appears to be no federal authority for such a bifurcated proceeding. Intervention of right by an insurer who, as in this case, is providing its insured with a defense under a reservation of rights, has consistently been denied (*see e.g., Travelers Indemnity Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989); *Restor-A-Dent Dental Lab v. Certified Alloy Products*, 725 F.2d 871 (2nd Cir. 1984)), and the Fund is not seeking intervention here. There is however, authority for more limited permissive intervention than the Fund seeks, without creating a bifurcated proceeding, for the purpose of attending discovery depositions and proposing special interrogatories and verdict

forms to assist in resolving coverage questions. See *Fidelity Bankers Life Insurance Co. v. Wedco, Inc.*, 102 FRD 41 (D. Nev. 1984); *Plough, Inc. v. International Flavors and Fragrances, Inc.*, 96 FRD (W.D. Tenn. 1982).

After careful consideration, the Court declines to adopt the bifurcated procedure established by the Alabama Supreme Court in *Universal Underwriters*, but finds that it would be appropriate to allow the Fund to intervene for the limited purpose of attending depositions, receiving copies of all discovery, attending the pretrial hearing, and proposing special interrogatories and verdict forms to be submitted to the jury. It should be understood that the Court is not agreeing that such proposed interrogatories and special verdict forms will be used, but is agreeing to allow the intervenor to propose them for the Court's consideration. Further, the Court is not authorizing the Fund to participate in the questioning of witnesses at depositions or to initiate discovery on its own, but only to attend depositions and to receive copies of discovery. It is, therefore, hereby ORDERED that the Association of County Commissions of Alabama Liability Self-Insurance Fund is permitted to intervene in this case for the following limited purposes:

> (1) being advised of and attending all depositions
>
> (2) receiving copies of all discovery and pleadings
>
> (3) attending the pretrial hearing
>
> (4) proposing to the Court special interrogatories and verdict pursuant to Rule 49,

Fed. R. Civ. P., for submission to the jury.

DONE this 13th day of December, 1993.

/s/ W. Harold Albritton, III
W. HAROLD ALBRITTON, III
UNITED STATES
DISTRICT JUDGE

STATUTES AND CONSTITUTIONAL PROVISIONS

42 U.S.C. § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Article V, § 138 of the Alabama Constitution reads in relevant part as follows:

> A sheriff shall be elected in each county by the qualified electors thereof . . .

Various statutes from the Alabama Code read in relevant part as follows:

§ 36-22-2:

> The sheriff must keep his office at the courthouse.

§ 36-22-3:

It shall be the duty of the sheriff:

* * * *

(2) To attend upon the circuit courts and district courts held *in his county* when in session and the courts of probate, when required by the judge of probate, and to obey the lawful orders and directions of such courts.

(3) The sheriff *of each county* must, three days before each session of the circuit court *in his county*, render to the *county treasury* or custodian of *county funds* a statement in writing and on oath of the moneys received by him *for the county*, specifying the amount received in each case, from whom and pay the amount to the *county treasurer* or custodian of *county funds*.

(4) It shall be the duty of sheriffs *in their respective counties*, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes *in their counties* and to present a report of the evidence so secured to the district attorney or assistant district attorney *for the county*.

(emphasis added)

§ 36-22-5:

The sheriffs in *their respective counties*, whenever directed to do so in writing by the district attorney or by the attorney general or governor, shall make special investigation of any alleged violation of the law *in their counties* and shall prepare a written report setting forth what information has been obtained as a result of such investigation together with the names of such witnesses as have been secured with a summary of what can be proven by such witnesses, which report shall promptly after its preparation be presented to the official who directed the investigation and, if such official shall be the governor or attorney general, he may present it to any solicitor prosecuting criminal cases *in the county*. The sheriff *of the county* shall proceed promptly by himself or by a competent deputy of experience and fidelity to make such investigation when directed as aforesaid.

(emphasis added)

§ 36-22-6:

(a) The expense of a special investigation when ordered as provided in section 36-22-5 shall be paid *from the county treasury*, upon a warrant properly drawn. After the report is made, the sheriff shall file *with the county commission* a detailed

> sworn statement of his expenses accompanied by the written approval of the officer directing the investigations, and *the county commission* shall audit and allow only so much thereof as it shall find reasonably necessary unless it is approved by the governor or attorney general, in which event they shall allow the money approved. The allowed expenses must be paid in each case *from the county treasury* upon a warrant drawn according to law.

(emphasis added)

§ 36-22-13:

> The books required to be maintained [by the Sheriff] by this article must at all times be open to the inspection of the public, free of charge, and must, at the expiration of his official term, be turned over to his successor in office. When a book has been completely filled or used up it must be deposited and kept in the office of the clerk of the circuit court *of the county*.

(emphasis added)

§ 36-22-16:

> (a) Sheriffs of the several counties in this state shall be compensated for their services by an annual salary payable in equal installments *out of the county treasury*

> as the salaries of other county employees are paid. The annual salary of the sheriff shall be $35,000.00, commencing with the next term of office, unless a higher salary is specifically provided for by law by general or local act hereafter enacted.

(emphasis added)

§ 36-22-17:

> All fees, commissions, percentages, allowances, charges and court costs heretofore collectible for the use of the sheriff and his deputies, excluding the allowances and amounts received for feeding prisoners, which the various sheriffs of the various counties shall be entitled to keep and retain, except in those instances *where the county commission directs* such allowances and amounts to be paid *into the general fund of the county* by proper resolution passed *by said county commission of said county*, shall be collected and paid *into the general fund of the county*.

(emphasis added)

§ 36-22-18:

> *The county commission* shall also furnish the sheriff with the necessary quarters, books, stationery, office equipment, supplies, postage and other conveniences and equipment, including

automobiles and necessary repairs, maintenance and all expenses incidental thereto, as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office.

(emphasis added)

§ 36-22-19:

The county commission of each of the several counties of the state may, in its discretion and upon application of the sheriff *of the county*, pay the sheriff's membership dues in the Alabama sheriffs association each year and also the sheriff's membership dues in the national sheriffs association each year.

The cost of any such membership dues, upon approval by the county commission, may be paid out of the *general fund of the county commission*.

(emphasis added)

§ 36-22-42:

The *governing body of each county* shall begin deducting on October 10, 1975, and each month thereafter from the salaries of such sheriffs an amount equal to four percent of the monthly salary paid such official up to $25,000.00. Such sum shall be deducted monthly and paid *into the general*

fund of the county.

(emphasis added)

§ 11-1-11:

(a) The county commissions of the several counties of the state are hereby authorized to pay all dues, fees and expenses of the sheriffs, tax assessors, tax collectors, circuit clerks and registers and license commissioners or other like officials in their respective counties that are incurred by such individuals through membership in and/or attendance at official functions of their state organizations

(b) Such dues, fees and expenses may be paid from the general fund of each county.

§ 11-2-30:

Upon the application of five or more resident freeholders of the county, addressed to the judge of the circuit court, and verified by the oath of one or more of the applicants, alleging that the bond of the judge of probate or the clerk of the circuit court or of the sheriff or of the tax assessor or of the tax collector or of the county treasurer is for any cause insufficient and setting forth the grounds upon which the allegation is based, such officer may be required to make a new bond, if, upon the

hearing of such application by the circuit court judge, it shall appear that the bond is for any cause insufficient.